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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. 482. 142.

EDWARD E. BESSETTE,
Appellant.

vs.

W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S MOTION TO ADVANCE.

(Memorandum Attached.)

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Burford Print Indianapolis.

12626

IN THE

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No. 462.

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W. B. CONKEY COMPANY,
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APPELLANT'S MOTION TO ADVANCE.

(Memorandum Attached.)

The appellant, Edward E. Bessette, moves the Honorable the Supreme Court of the United States to advance on its docket the cause above entitled, and for his reasons, the appellant saith:

1. The cause comes here on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit, that Court desiring the advice and instruction of the Supreme Court on the following questions of law, viz.:

> First. Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of a Circuit Court

of the United States, finding a person guilty of contempt for violation of an order of that Court and imposing a fine for the contempt.

Second. Whether the "act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891 (26 Stat. 826), authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that Court made in such suit, and imposing a fine for such contempt.

Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error.

2. The case involves and affects a matter of general public interest in that the issues presented require a construction, as a question of first impression in this Court, of the Act of Congress approved March 3, 1891, creating the United States Circuit Court of Appeals, with respect to the jurisdiction of that Court to review upon appeal a judgment of a Circuit Court convicting a party of contempt for the violation of an injunction, which jurisdiction this appellant contends exists by virtue of Section 6 of said act which provides that said Court of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Courts and in the existing Circuit Courts *in all cases*

other than those provided for in the preceding section of this act (relating to jurisdiction of the Supreme Court) *unless otherwise provided by law,*" etc.

3. Because of the uncertain state of the law respecting the right to an appellate review of those condemned as this appellant was, by a judgment convicting him of contempt, and imposing a penalty, with respect to which uncertainty in the law the appellant begs to state the following specifications:

It is unquestionable that in England, for many years, it was deemed essential to the due administration of justice, that every Court, at least of the superior kind, in which great confidence was placed, must be the sole judge of contempts arising therein (*The Earl of Shaftsbury's case, A State Trials, 615*); and that the sole adjudication of contempts and punishment thereof belonged exclusively and without interfering, to each respective Court.

The distinction between adjudications for contempt which interfered with the rights of the parties, and those which assailed the dignity of the Court, has become so well recognized in that country, as that it is now spoken of as a platitude. In *Seaward vs. Paterson* (1897), 76 Law T. (N. S.) 215, one Murray endeavored to confuse the two classes of cases by making that defense to a charge of contempt in obstructing the due administration of justice which would be available only against a charge of contempt for violating an injunction. The Court said:

> "The notice of motion to commit for breach of an injunction, which is technically wrong, unless he is bound by the injunction, and a notice of motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the case or anything of that kind, but because he is conducting himself so as to obstruct

> the course of justice, are totally different things. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against. The proceedings against him are for the purpose of enforcing an order of the Court for the benefit of the person who got the order. In the other case the Court will not allow its process to be set at naught and treated with contempt. The consequence is this: that in the one case the party who is interested in enforcing the order is enforcing it for his own benefit, while in the other case, if the order of the Court has been contumaciously set at naught, he can not settle it with the person so acting and save that person the consequences of his act. The difference between the two kinds of contempt is well known, although in some cases there may be a little difficulty in saying on which side of the line they fall."

To the same effect is the case of *Wellesley vs. Earl of Mornington*, 11 Beav. 181. This last case is cited with approval by Judge, now Mr. Justice, Brown, in *Phillips vs. City of Detroit*, 19 Fed. Cas. 512 (No. 11101), by the Supreme Court in *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, and by the United States Circuit Court in *American Steel and Wire Co. vs. Wire Drawers' and Die Makers' Unions*, Nos. 1 and 3, 90 Fed. 598, and in 2 Daniell, Ch. Prac. (5th ed.), p. 1685.

In this country that same distinction is drawn, and in most of the states, by statute, an appeal is allowed from an adjudication for contempt for violation of an injunctional order in a suit, which violation worked an injury to a party, and the punishment imposed was damages awarded to the party. In such cases the statutes, in many states, have expressly allowed an appeal, treating such adjudication for contempt as a civil proceeding.

In the federal jurisprudence, up to the time of the establishment of Circuit Courts of Appeals, it was controverted whether an appeal could be entertained to review an adjudication for contempt in a case where the dignity of the Court had been invaded. Appeals in other cases of contempt were allowed. As early as 1812, in *Ex parte Kearney*, 7 Wheat. 38, the Supreme Court, speaking through Mr. Justice Story, held upon *habeas corpus*, that where one was committed for contempt by a Court of competent jurisdiction for refusal to answer as a witness, the Court issuing the writ of *habeas corpus* could not inquire into the sufficiency of the cause of commitment.

The Supreme Court, in some cases, seems to have treated an adjudication for contempt as a criminal proceeding. Thus, in the year 1874, in *New Orleans vs. Steamship Company*, 20 Wall. 387, the Court say:

> "The fine of three hundred dollars imposed upon the Mayor is beyond our jurisdiction. Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This Court can take cognizance of a criminal case only upon a certificate of division in opinion."

There the Mayor of the city was fined for contempt in prosecuting another suit and obtaining an injunction in another suit.

In *Hayes vs. Fischer* (1880), 102 U. S. 121, upon a *writ of error* from an adjudication for contempt against *a party to the suit, charged with violating an injunction*, the Court say:

"If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this Court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it can not be re-examined here, either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat. 38, and the rule then established was followed as late as *New Orleans vs. Steamship Company*, 20 Wall. 387. It follows that we have no jurisdiction."

In *Worden vs. Searls*, 121 U. S. 14 (1886), the Court again recognized the distinctions in procedure stated in *Hayes vs. Fischer*, *supra*, and sustained an appeal. Orders convicting the appellants of contempt in violating an injunction were reviewed and vacated. The Court distinguished *Ex parte Kearney*, *supra*, and *New Orleans vs. Steamship Company*, *supra*. At pages 24 and 25, the Court said:

"The appellants ask for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this Court can not review the action of the Circuit Court in punishing a contempt committed by a violation of such injunction, (1) because the proceedings were criminal in their character; (2) because the action of the Circuit Court is, by Section 725 of the Revised Statutes, expressly made discretionary.

"All the proceedings, which resulted in the imposition of the fines, were taken and entitled in the suit. The order of March 6, 1882, is entitled in the suit, and adjudges 'that

the said defendants are guilty of the contempt charged against them for a violation of the injunction issued in this cause, and that said defendants, Alva Worden and John S. Worden, pay to said complainant, Anson Searls, the sum of two hundred and fifty dollars, as a fine for said violation, together with costs of said proceedings, to be taxed, and that said defendant stand committed until the same be paid.' The order of October 9, 1882, is entitled in the suit, and orders 'that said defendants, Alva Worden and John S. Worden, do pay a fine of eleven hundred and eighty-two dollars to the Clerk of this Court, to be paid over by said Clerk to complainant for damages and costs, and that said defendants do stand committed until the same is paid.' It appears that the $1,182 was made up of $682, the profits of the defendants on 62 gross of whip-sockets sold, and $500, expenses of the plaintiff in the contempt proceedings.

"We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness of propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent."

Followed (1896) as to remedial fines in *Indianapolis Water Co. vs. American Strawboard Co.*, 75 Fed. 978.

In 1894, *In re Debs*, 158 U. S. 564, the Court reviewed, on *habeas corpus*, the commitment of Debs, a party to the suit, for contempt, by the Circuit Court of the United States for the Northern District of Illinois. The petitioner had first applied for a writ of error. That petition was denied (159 U. S. 251), upon the

ground, as stated in 158 U. S. 573, that the order of the Circuit Court was not a final judgment or decree, though that would seem to be opposed to the doctrine in 20 Wallace, 387.

In re Chetwood, petitioner (1896), 165 U. S. 443, the Chief Justice, delivering the opinion of the Court upon an application for a writ of *certiorari* to revise or annul the order of the lower Court as being in excess of jurisdiction, though imposed against a party to a suit, charged with contempt, remarked:

> "Judgments in proceedings in contempt are not reviewable here on error or appeal. *Hayes vs. Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251; but they may be reached by *certiorari* in the absence of any other adequate remedy."

In *Tinsley vs. Anderson* (1898), 171 U. S. 101, Tinsley obtained from the Circuit Court of the United States a writ of *habeas corpus* upon the ground that he was deprived of his liberty by the judgment of the Texas Court without due process of law and in violation of the Constitution of the United States. Tinsley was a party to the suit and was charged with resisting the process of the Court. The Circuit Court dismissed the writ and remanded the prisoner and he appealed to the Supreme Court, and also sued out a writ of error from the Supreme Court to review the judgment of the Court of Criminal Appeals of Texas. In this case the Court, at page 105, put the doctrine with regard to jurisdiction of appeals, or writs of error, from adjudications of commitment by the Circuit Court or District Courts of the United States, in proceedings which are independent of the principal suit, upon the ground that they were judgments in criminal cases, and that this Court had no appellate jurisdiction in such cases.

MEMORANDUM: Up to the Act of 1891, establishing the Circuit Courts of Appeals, it appears that where the contempt proceeding was remedial, it would be reviewed on a proper appeal, but where the contempt proceeding was punitive, there was no jurisdiction to review in an appellate court.

Was this jurisdiction to review in contempt cases of every character finally conferred by that act upon the Circuit Courts of Appeals? The act is entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." For the first time Congress conferred appellate jurisdiction in criminal cases. By Section 5, that jurisdiction was conferred upon the Supreme Court "In any cases of a conviction of a capital or otherwise infamous crime." Section 6 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal, or writ of error, final decisions in the District Court and existing Circuit Courts in all cases other than those provided for in the preceding section of the act which defines the jurisdiction of the Supreme Court, and it provides that the judgment or decrees of the Court of Appeals shall be final, (1) in all cases where the jurisdiction is dependent entirely upon the opposite party to the suit in controversy being aliens and citizens of the United States, or citizens of different states; (2) in all cases under the patent laws, under the revenue laws, under the criminal laws and in admiralty cases.

Is an adjudication for contempt a case under the laws of the United States? It is a fair presumption that Congress designed by this act to include contempts under that head, for two reasons, (1) In appreciation of the correct results attained in the procedure

in those states where an appellate review is allowed by statute, and (2) in order that this Court, or the Courts of Appeals might correct inequalities in the law which exist in different sections of the country and establish a uniform procedure that would better conserve the administration of justice. It can not be urged effectively that the phrase "all other *cases*, etc.," used in the act means only prosecutions for violation of statute law or prosecutions for offenses created by the statutes of the United States, and therefore excludes contempt proceedings. Contempt of Court, where the proceeding is punitive, as distinguished from remedial, is not only a distinct statutory offense, but this Court, prior to the passage of the Act of 1891, had repeatedly used the word "case" as the appropriate name for such proceedings.

Hayes vs. Fischer, supra;
New Orleans vs. Steamship Co., supra;
In re Debs, supra (158 U. S.).

Congress used only the same designation this Court had previously adopted, and the same designation that had been used in respect to the statutory crime of contempt.

See *Ex parte Robinson*, 19 Wall. 505; *In re Savin*, 131 U. S. 267, as to the statutory offense of contempt of Court.

A contempt, where the proceeding is remedial, is not made a crime by the statutes of the United States (*Ex parte Reese*, 107 Fed. 942 and cases cited). The power of punishing for contempt as a remedy at the instance of a private suitor is inherent in the Courts, and is not given by statute, although sometimes regulated by statute (*Ex parte Robinson*, supra; *In re Savin*, supra).

In *Sessions vs. Gould*, 11 C. C. A. 550, the Second Circuit held that an order adjudging a party in contempt could not be reviewed

by an appeal, intimating that it might be done by writ of error. The case was subsequently brought up by writ of error, *Gould vs. Sessions*, 14 C. C. A. 366, and there reviewed, the Court holding that it was a judgment in a criminal case and it had jurisdiction under the act creating the Court. But in *Nassau Electric R. Co. vs. Sprague Electric Railway and Motor Company*, 95 Fed. 415, in 1899, the same Court, upon a writ of error from a judgment of commitment against a party for violation of an injunction, dismissed the writ, reversing their previous ruling upon the authority of the Debs case, and held that such order could only be reviewed by an appeal from the final decree in the cause in which the order was issued.

In the Circuit Court of Appeals a writ of *certiorari* was allowed upon the motion of the appellee bringing up the final decree in this cause. The appellee is possibly concluded by that motion and the action of the Court thereon from asserting (1) that the final decree is not germane to the proceedings against Bessette or *vice versa*, and (2) that this Court can not do justice to all parties, because of a diminution of the record. It is indeed a question whether this Court might not properly hold that by the act of supplementing the record on the writ of *certiorari* the appellee had authorized the Circuit Court of Appeals to treat this case now as within the rule stated *In re Chetwood*, 165 U. S. 443.

There is this danger attending the Debs case as a precedent: In that case the United States sought a civil remedy by injunction. The United States appeared, therefore, upon the face of the record as a complainant, just as it would have done had the proceeding been criminal. The people are so used to seeing the name of

the Government appear in a criminal case, that all cases are likely to be regarded as criminal, if it appears that the Government is the complainant. Those who indifferently determine the nature of the cause by ascertaining the parties to it might be misled by the Debs case into the assumption that that proceeding was punitive when it was in fact remedial. A writ of error was clearly an inappropriate remedy, and a review by appeal was not asked, so that on that point the Debs case would be *obiter*.

This misapprehension of the true purport of the Debs case is augmented by the prominence of that case and the notoriety of the facts upon which the suit was based. In commenting on the right of trial by jury, Mr. Justice Brewer, speaking for the Court, remarked that every Court must be the sole judge of contempts committed therein. That was a correct statement of the rule as it bore upon the issue presented—the right of trial by jury. The Court was not called upon to speak, and it did not speak as to the right of an appellate review by appeal. Aside from the reasons given by the Court, it is clear that a jury was properly denied Debs. The proceedings throughout were in chancery. In so far as its own agencies are concerned, a United States Court of Chancery does not know what a jury is. There is no process available to obtain a jury and no authority in law for a chancellor to obligate a jury or to transfer to it any of the duties which the chancellor must perform in discharge of his office. If the Circuit Court had called "a jury" to try Debs, it would have abdicated important functions to strangers, those whom the law knew not, those whose presence were not provided for by law. A federal judge can not delegate any of his powers. He can not call a by-

stander to perform any of those judicial functions which the Constitution requires shall be performed by judges whom the President "shall nominate and by and with the advice and consent of the Senate shall appoint."

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for the Appellant, Edward E. Bessette.

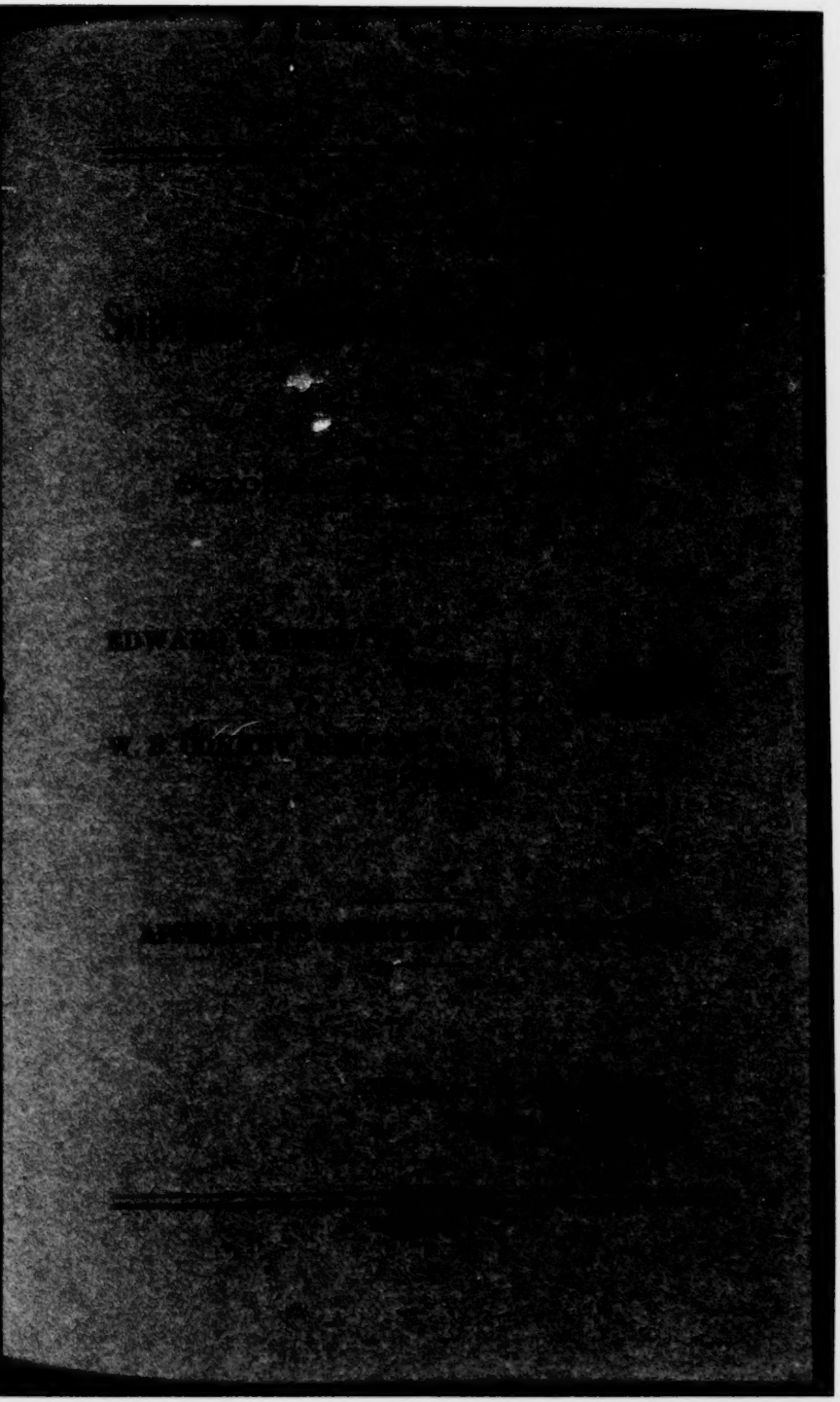
Indianapolis, Ind., January 8, 1903.

The W. B. Conkey Company, appellee in the cause above entitled, will take notice that on Monday, the 19th day of January, A. D. 1903, or as soon thereafter as counsel can be heard, Edward E. Bessette, the appellant, will, at the court room of the Supreme Court of the United States, in the City of Washington, D. C., present the foregoing motion to the Honorable the Supreme Court of the United States and thereupon ask that said motion be heard.

WILLIAM VELPEAU ROOKER,
As Attorney for Appellant, Edward E. Bessette.

We hereby acknowledge the receipt of a copy of the foreging motion and notice this 8th day of January, A. D. 1903.

MORRIS & NEWBERGER,
Of Attorneys for the Appellee, The W. B. Conkey Company.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

EDWARD E. BESSETTE,
Appellant,
v.
W. B. CONKEY COMPANY,
Appellee.
No. ——.

APPELLANT'S ADDITIONAL AUTHORITIES.

CONTENTS OF THIS MEMORANDUM.

This memorandum contains a digest of all the reported cases of contempt of court determined in the circuit and district courts of the United States. It includes, also, an historical allusion to the Judiciary Act of 1789, authorizing the courts to punish for contempt, and to the amendatory act of 1831. An act of congress concerning the issuance of injunctions is set forth, as are, also, certain rules of this court prescribing the method of procedure in contempt cases. The purposes of the court of appeals as those purposes have been stated by this court, are recited. The manner in which cases of contempt were treated with respect to review on writ of error or by appeal prior to 1891

is set forth in the light of decided cases. Much attention is given to the nature of contempt proceedings, demonstrating that they may be civil and criminal, or private and public, or remedial and punitive, as the case may be, and the decisions are reviewed for the purpose of ascertaining, if possible, the law of the land with respect to this interesting branch of jurisprudence. It is found that resort to contempt proceedings has been had for both remedial and punitive purposes. The remedial objects are sometimes attained by orders which are coercive and prohibitory, for the purpose of compelling obedience in matters of procedure and sometimes by orders which are coercive and mandatory. A numerical summary is made and set forth in a table which classifies the cases (1) geographically by circuits, and (2) according to the causes for which the proceeding may be maintained, as those causes are stated in the act of congress concerning contempt. R. S., Sec. 725. A special column has been set apart for cases of orders against workingmen, and into that column are collected all the cases in which injunctions have been violated by workingmen. In addition to the cases set forth in that column there have been some instances in which the industrial classes have been punished for interfering with property in the hands of receivers; but the column relating to interference with property contains all the cases of such interference by whomsoever committed. It appears that out of the 180 reported cases only sixteen have been instituted against workingmen since the birth of the government, and that all those sixteen cases were confined

to the fourth, sixth and seventh circuits, with the exception of two instances in the eighth circuit. In the first, second, third, fifth and ninth circuits the procedure appears not to be used in labor controversies. In the fourth circuit the procedure seems to prevail only in the Virginias. The eighth circuit has, as the reported cases show, ceased to resort to the remedy against workingmen, so that this branch of jurisprudence appears now to be recognized as potential only in the sixth and seventh circuits and in part of the fourth circuit.

There are, no doubt, many deficiencies in the work here undertaken, but the writer has done it with the hope that the results, though they may not accomplish all that the court requires, will nevertheless be useful.

It may be noted that the law of contempt has often involved cases of the greatest magnitude and in which the nation has needed the wisdom of this court in the solution of the issues. Among such cases are the treason trials of Aaron Burr, the conflict between the army and the judiciary as demonstrated in the imprisonment of Judge Hall and the fining of General Andrew Jackson for contempt of court at New Orleans in 1815, the impeachment of Judge Peck, the effort of President Lincoln to suspend the writ of habeas corpus without an act of congress, cases arising under the Interstate Commerce Act and wherein the United States appears as a civil litigant, the efforts of St. Clair county, Missouri, to repudiate certain obligations, and the controversy between the court of appeals for the ninth circuit and the federal courts in Alaska.

The matter is arranged under the following subtitles:

HISTORY OF THE JUDICIARY ACT. SOME EARLY CASES.

TO PUNISH FOR CONTEMPT IS THE EXERCISE OF JUDICIAL POWER.

JURISDICTION OF THE PERSON AND RULES OF PROCEDURE.

THERE MUST BE PRIVITY OF INTEREST IN THE ACTORS IN CIVIL CONTEMPT.

THE COURT SHOULD NOT EXTEND THE INJUNCTION IN CONTEMPT PROCEEDINGS.

THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY FOR COMPENSATING THE INJURED PARTY.

FURTHER AS TO THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY TO REQUIRE OBEDIENCE BY COERCION.

THE OFFENSE IS CRIMINAL WHEN COMMITTED AGAINST THE COURT OR THE AGENCIES OF THE COURT AND THE FINE IS PUNITIVE.

CASES ARISING UNDER THE INTERSTATE COMMERCE ACT AND WHEREIN THE UNITED STATES APPEARS AS A CIVIL LITIGANT.

THE CIRCUIT COURT OF APPEALS ACT GIVES THE RIGHT TO A REVIEW BY APPEAL OF WRIT OF ERROR ACCORDING TO THE NATURE OF THE PRINCIPAL CASE IN THE COURT BELOW.

FINAL AND INTERLOCUTORY ORDERS IN THE SUIT. CONTEMPT PROCEEDINGS ARE INTERLOCUTORY IN EQUITY AND HAVE THE LEGAL EFFECT OF AN ORDER CONTINUING THE INJUNCTION.

MEANING OF THE WORD "CASE" AND HEREIN REFERENCE IS MADE TO PROCEEDINGS APART FROM THE ENFORCEMENT OF CIVIL REMEDIES.

TABLE.

REVIEW IN CONTEMPT PROCEEDINGS SINCE THE CIRCUIT COURT OF APPEALS WAS CREATED.

The History of the Judiciary Act. Some Early Cases.

In December, 1825, Judge James H. Peck, of the United States District Court for the District of Missouri, decided against the claims of the widow and children of Antoine Soulard to certain lands in Missouri and in the then territory of Arkansas. Luke E. Lawless of St. Louis had been one of counsel in prosecuting the claims. Mr. Lawless wrote an article for a St. Louis newspaper in which he enumerated the errors into which the trial judge had fallen. In April, 1826, Judge Peck summoned Mr. Lawless and proposed to propound to him certain interrogatories in a proceeding to punish for contempt. Mr. Lawless declined to answer the interrogatories. He was adjudged guilty of contempt, was disbarred from practice, and committed to prison. Mr. Lawless complained to congress. The judiciary committee of the House reported articles of impeachment which were adopted at the first session of the twentieth congress, at which session the senate was organized as a court of impeachment

though the impeachment trial did not take place in the senate till the second session. In the impeachment of Judge Peck congress followed the precedents established in the impeachment of Judge Samuel Chase in 1804. In the impeachment of Judge Peck the learned counsel in their arguments reviewed exhaustively the powers of the courts of England in the exercise of their common law jurisdiction and discussed the abridgment of those powers by the constitution of the United States and the judiciary act of 1789. The trial of Judge Peck resulted in his favor by a vote of 21 for and 22 against impeachment, but immediately thereafter Mr. James Buchanan, chairman of the judiciary committee of the House, presented a bill limiting the power of the courts to punish for contempt. The bill was passed in the senate, by a large majority, as the act of March 2, 1831, and remains in force as section 725 of the revised statutes.

The judiciary act of 1789 was reported by Oliver Ellsworth, chairman of the judiciary committee of the senate. It was passed substantially as reported. Judge Ellsworth was a member of the federal constitutional convention in 1787, a United States senator in 1789, was chief justice of this court from 1796 to 1800, resigning his office while in France with Patrick Henry and William Davie to secure a treaty.

Perhaps the most notable case involving the law of contempt, prior to Judge Peck's case, was that in which Gen. Andrew Jackson was fined one thousand dollars by Judge Hall in the United States circuit court at New Orleans

in March, 1815. General Jackson had refused to recognize a writ of habeas corpus issued out of Judge Hall's court while New Orleans was under martial law. In addition to refusing to respect the writ, General Jackson placed Judge Hall under military arrest for having issued the writ. The day after Judge Hall's release he summoned General Jackson to appear in court and fined him one thousand dollars. The fine was refunded to Jackson by act of congress in 1844, with interest. The proceedings were prima facie so summary that the case is not reported.

In Ex parte Poulson, 15 Haz. Reg. Pa. (1835) 380; 19 Fed. Cases No. 11,350, decided by Mr. Justice Baldwin in 1835, the circumstances are stated under which the amendatory act of 1831 was passed. Justice Baldwin had before him a motion for a rule on Poulson, editor of the American Daily Advertiser of Philadelphia, to show cause why an attachment should not issue against him for a contempt of court in publishing an offensive article concerning a party whose cause was at the time on trial in Philadelphia. The court reviewed the original provisions of the judiciary act and then stated the facts concerning the impeachment of Judge Peck, who had punished a lawyer for publishing a newspaper article offensive to the court, which had decided adversely to the writer a recent suit. Justice Baldwin held that the purpose of the amendatory act was to deprive the courts of power to protect suitors against the influence of the press; that the act of congress was binding on the courts and that authority to punish for contempt was restricted to a limited class of cases to which the one under consideration did not belong.

Probably the earliest case of contempt in the jurisdiction of the United States courts is that of Weiberg et al. v. The St. Oloff, in admiralty, decided in the district court of Pennsylvania in 1790, 2 Pet. Adm. 428; 29 Fed. Cases No. 17,357. Two Swedish seamen filed their libels seeking release from service under a cruel master. A citation was issued to the captain of the vessel, who refused to receive the writ on the ground that it would be an affront to his Majesty the King of Sweden for him to acknowledge a foreign jurisdiction with respect to the affairs of the vessel. The Swedish consul came before the court and stated the defense of the captain. He also claimed that by the treaty with Sweden the United States remitted such controversy as the present one to the Swedish consul. Thereupon the court directed the seamen to return to the vessel pending further consideration of the case. On their return to the ship the seamen were grossly maltreated by the captain. A motion was then made for an attachment against the captain for contempt of court in maltreating the seamen while their cause was pending. After a hearing the motion was sustained and the captain was thereupon put upon trial. He was convicted of contempt and fined $25.00 and ordered committed until the fine was paid. From the report of the case it does not appear that either the proctors or the court suggested the existence of the section of the judiciary act of 1789, authorizing the court to punish for contempt.

To Punish for Contempt is the Exercise of Judicial Power.

In punishing for contempt, the courts exercise a power which is within the constitutional protection of due process of law.

In Ex parte Doll, 7 Phila. 595, 7 Fed. Cas. No. 3968, Judge Cadwalader, in discharging a prisoner who had been by a United States commissioner committed for refusal to comply with an order of the commissioner to produce his books for examination, said that he doubted the power of congress to invest a commissioner with the authority in a proceeding originally instituted before him to summarily commit a citizen for an alleged contempt. This was an exercise of judicial power of the United States, which, under the constitution, could not be entrusted to an officer appointed and holding office, as the commissioners were appointed and held office.

In re Perkins, 29 Fed. Rep. 900, Judge Gresham discharged, on a writ of habeas corpus, parties who had been committed for contempt by a commissioner. The court held that the power to punish for contempt could not be exercised by a commissioner.

In re Mason, 43 Fed. Rep. 510, Judge Nelson, on a writ of habeas corpus, discharged a prisoner who had been committed by a commissioner for contempt in refusing to obey a writ of summons. In his opinion, Judge Nelson quotes Mr. Justice Miller in the case of Kilbourn v. Thompson, 103 U. S. 182, as follows: "The constitution declares that no person shall be deprived of his life, liberty or property.

without due process of law, and it has been repeatedly held by the United States supreme court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law and governed by the rules of law previously established."

In re Monroe, 46 Fed. Rep. 52, Judge Parker, on a writ of habeas corpus, held that a federal court had jurisdiction, under the constitution of the United States, to determine whether one held in prison for contempt committed against a state court, was deprived of his liberty without due process of law.

In Johnson Steel, etc., Co. v. North Branch, etc., Co., 48 Fed. Rep. 196, Judge Reed sustained an application made by a master for a rule against a witness to show cause why he should not be punished for contempt for refusing to answer certain questions submitted at an examination before the master. The rule was to be discharged only after the witness had answered the questions and paid the costs of the proceedings.

In Ex parte Young, 50 Fed. Rep. 526, Judge Key, on a writ of habeas corpus, reviewed the jurisdictional questions involved in the case of a divorced husband who, in disregard of the decree of divorce, removed his child to a point beyond the State, for which he was committed for contempt. Judge Key held that the prisoner was not confined without due process of law or in violation of the constitution of the United States.

In Carman v. Emerson, 71 Fed. Rep. 264, the circuit court of appeals for the eighth circuit held that one who

had been adjudged guilty of contempt for failing to obey a writ of subpoena could be punished for contempt notwithstanding he had a valid reason for failing to obey the writ. The question came up collaterally in an action for false imprisonment, in which the facts shown were that the plaintiff having been subpoenaed failed to state his lawful excuses for disregarding the writ and being cited for contempt was required to prove his exemption from the writ of subpoena. In so far as the opinion holds that the witness can be punished for contempt, despite his showing that he is exempt from service, the case seems to be contrary to the current of authority, and its practical effect would mean a conviction without trial, and to do this would deny to the accused the due process of law.

In Johnson v. Southern Building & Loan Assn., 99 Fed. Rep. 646, Judge Paul refused to sustain the action of a commissioner who held that a foreign receiver could not appear by counsel at an examination before the commissioner on the ground that the foreign receiver was in contempt in having failed to deliver certain papers. Judge Paul held that it was a judicial function to determine whether a party was in contempt, and that the power was not such as a commissioner could exercise.

In re Perkins, 100 Fed. Rep. 950, a commissioner had attempted to punish for contempt a deputy marshal who had failed to serve a warrant, and upon being admonished, had written an impudent note to the commissioner. Judge Purnell held that a commissioner was not a United States court, and that as the statute confined to courts the power

to punish for contempt, the acts of the commissioner were void. The commissioner should have reported the facts to the proper district court, which had authority to enforce obedience to its writs.

In Smith v. Belford, 106 Fed. Rep. 658, the circuit court of appeals for the sixth circuit sustained the right to resort to punishment for contempt as a coercive measure to require a bankrupt to deliver his assets to the trustee, but held that the power was a judicial power which could be exercised only by the district court and could not be exercised by a referee in bankruptcy.

In Ex parte Stricker, 109 Fed. Rep. 145, Judge Evans released on a writ of habeas corpus a Cincinnati lawyer who was imprisoned in the Kenton county, Kentucky, jail for contempt of a state court. The judge of the Kentucky court, being absent from his state, telegraphed his clerk an order of adjournment. Thereupon the Cincinnati lawyer, in the exercise of a statutory right, under the laws of Kentucky, demanded the selection of a special judge, which demand was not granted. Upon the return of the regular judge, and after he had convened court, he inquired as to the person who had demanded the special judge, and upon being informed by Stricker that it was he who had done so, the judge fined him $25, and ordered him committed till the fine was paid. Judge Evans on the writ of habeas corpus held that in contempt proceedings the accused was entitled to the protection of the constitutional guaranty that he should not be deprived of liberty without due process of law.

In Ex parte Davis, 112 Fed. Rep. 139, Judge Pardee, with Judges McCormick and Shelby concurring, held on a writ of habeas corpus that an attorney who had been sentenced to imprisonment for ten days, and to pay a fine of $100, should be discharged upon satisfying either the sentence or the fine, the statute authorizing punishment for contempt not permitting both fine and imprisonment.

In Ex parte Nugent, 1 Brunner Col. Cas. 296; 18 Fed. Cases No. 10,375, Judge Cranch of the circuit court of the District of Columbia on petition for a writ of habeas corpus, whereby Nugent sought his release from imprisonment under a commitment issued by the senate for contempt of that body, endeavored to sustain the right of congress to exercise powers similar to those exercised by parliament. He disregarded the limitation prescribed by the constitution, and while the case furnishes an interesting review of the English authorities, yet the principles it declares are no longer of consequence since the decision of this court in Kilbourn v. Thompson, 103 U. S. 168.

The Kilbourn case has been accorded distinguished consideration by the judiciary, some of the many instances being as follows: Cited and relied upon in In re Mason, 43 Fed. Rep. 516, holding commissioner of circuit court had no power to punish witness for failure to obey subpoena; Langenberg v. Decker, 131 Ind. 482, 16 L. R. A. 113, reviewing authorities, statute giving tax commissioners power to punish for contempt, invalid; People v. O'Brien, 111 N. Y. 58, 7 Am. St. Rep. 710, 2 L. R. A. 267, and note, statute providing for taking away its prop-

erty on dissolution of corporation, unconstitutional; Cross v. Brown, 19 R. I. 232, upholding provisions as to attachment by trustee process. Cited in State v. McLelland, 18 Neb. 240, 53 Am. Rep. 817, holding presiding officer's certificate merely prima facie evidence that bill passed house. Cited and relied upon in Smith v. Myers, 109 Ind. 7, 58 Am. Rep. 380, reviewing authorities, refusing to enjoin the delivery of election returns to speaker of house; Hovey v. Foster, 118 Ind. 508, holding court could not review facts passed on by legislature to determine validity of act; Lowe v. Summers, 69 Mo. App. 648, holding legislature might punish witness for refusal to answer questions of committee to investigate police commission; Ex parte Dalton, 44 Ohio St. 151, 153, 58 Am. Rep. 802, 804, where witness was punished for contempt of committee on privileges and elections. Approved in In re Pacific Ry. Commn., 12 Sawy. 576, 579, 596, 598, 32 Fed. Rep. 251, 254, 266, reviewing authorities, refusing to compel witness to testify, before commission, under act of March 3, 1887; Lester v. People, 150 Ill. 241, 41 Am. St. Rep. 382, holding court could not compel surrender of party's private books, etc., for indefinite period; Courtnay v. Knox, 31 Neb. 659, holding notary could not punish for contempt; dissenting opinion in Interstate Commerce Commn. v. Brimson, 155 U. S. 4, majority sustaining validity of twelfth section of interstate commerce act; Koehler v. Hill, 60 Iowa, 675, 699, arguendo; State v. Seaton, 61 Iowa 569, majority remanding prisoner committed by justice of peace. See note in 1 Am. St. Rep. 886. Dis-

tinguished in Interstate Commerce Commn. v. Brimson, 154 U. S. 478, 485, upholding twelfth section, interstate commerce act; In re Chapman, 166 U. S. 668, where witness was compelled by senate to testify as to whether its members had dealt in certain stocks; People v. Keeler, 99 N. Y. 476, 477, 484, 486, 52 Am. Rep. 54, 55, 60, 62, witness punished for refusal to testify before committee investigating charges against public officer. Cited and principle applied in United States v. Lee, 106 U. S. 220, allowing recovery of land seized under order of president for cemetery and fort; State v. Noble, 118 Ind. 352, 10 Am. St. Rep. 145, 4 L. R. A. 104, act providing for supreme court commissioners held unconstitutional; In re Sims, 54 Kan. 6, 45 Am. St. Rep. 263, 25 L. R. A. 112, act giving county attorney power to punish witness for contempt, invalid; Ex parte Ginnochio, 30 Tex. App. 590, act attempting to take away jurisdiction of court, conferred by constitution, invalid; dissenting opinion in State v. Hyde, 121 Ind. 44, majority holding act invalid as infringing executive's constitutional right to appoint certain officers; arguendo, in Tindal v. Wesley, 167 U. S. 217; dissenting opinion in Robertson v. State, 109 Ind. 94. See monograph in 13 Am. St. Rep. 139. Limited in Hovey v. State, 119 Ind. 401, holding power of appointment not vested exclusively in executive. In re Davis, 58 Kan. 381, holding statute did not give legislative committee power to punish witnesses for contempt; arguendo, in Jones v. Lamar, 34 Fed. Rep. 462; dissenting opinion in Koehler v. Hill, 60 Iowa 675, 699, and Purnell v. Mann (Ky.), 50

S. W. 266. See note in 74 Am. Dec. 681. People v. Sharp, 107 N. Y. 445, 1 Am. St. Rep. 857, where committee was appointed to investigate bribery charges; De Camp v. Archibald, 50 Ohio St. 626, 40 Am. St. Rep. 697, upholding notary's power to punish witness refusing to answer, in taking deposition. See note in 74 Am. Dec. 681.

But the limitations of the constitutions do not apply exclusively to congress. The same instrument that denies to our legislative body powers enjoyed by parliament also denies to our courts powers exercised by the courts of England. For this reason the English cases are likely to prove dangerous authorities in cases involving the liberties of a citizen. In a country where the people are subjects of the sovereign and the courts are an agency of the sovereign, exercising judicial powers of the sovereign over the subjects, the situation is essentially different from that which exists in a country where the people are not subjects but citizens; where the government is one "of the people, by the people and for the people;" where the courts exercise only such powers as are delegated to them by the citizens, and where the reserved powers of sovereignty repose in the citizens. (Munn. v. Illinois, 94 U. S. 113; Illinois Central R. Company v. Illinois, 146 U. S. 387). This court has held that the power of courts to punish for contempt was, under the limitations of the constitution, to be exercised only as authorized by the acts of congress. Ex parte Robinson, 19 Wall. 505; In re Chiles, 22 Wall. 157; In re Savin, Petitioner, 131 U. S. 267. It follows, of

course, that if the power to punish for contempt is only delegated to the courts it is not inherent in them. Some confusion appears in some of the cases because the *inherent* powers of the English courts have been invoked to illustrate the *implied* powers of the courts of the United States. The question is material here, and of vast importance, because it goes to the power of the circuit court, in this case to entertain jurisdiction of a civil controversy between two citizens of Illinois. Mr. Bessette claims that the United States circuit court for the district of Indiana had no jurisdiction of any cause of action which might arise between him and the W. B. Conkey company, so long as both were citizens and residents of Illinois and no federal question was asserted or involved. And Mr. Bessette further contends that if the circuit court had no authority to adjudicate his rights as against those of the appellee, then the court had no power to enforce as against the appellant by civil process the court's adjudication made in favor of the appelle. The power to execute the judgment ought not be greater than the power to render the judgment.

In United States v. New Bedford Bridge, 1 Woodb. & Minot 401; 27 Fed. Cases No. 15,867, Mr. Justice Woodbury held that the authority to punish for contempt was granted as a necessary incident in establishing a tribunal as a court; that the common law could not be resorted to for aid in giving jurisdiction to the courts of the United States, but only in deciding certain questions after jurisdiction had been otherwise obtained.

In Toledo, Ann Arbor, etc., R. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730, Judge Taft passed upon a bill for an injunction against connecting lines of railroad, and against officers of the Brotherhood of Locomotive Engineers, who were charged with conspiring to boycott the Ann Arbor line, because of a strike on the part of its engineers. Judge Taft held that the jurisdiction of his court was determined by the federal question presented in the disturbance of interstate commerce, and that his court should entertain the suit, though there was not a diversity of citizenship. The bill as to one F. P. Sargent was dismissed, because he was a non-resident of Ohio, in which state the bill was filed.

The manner in which courts must proceed in order to retain the jurisdiction which their lawful writs authorize them to exercise in any given case has been so recently and learnedly set forth in Hovey v. Elliott, 167 U. S. 409, as that the citation here of other authorities would be useless.

In Sommerville v. French, 1 Cranch C. C. 474; 22 Fed. Cases No. 13,173, decided in 1807, the circuit court for the District of Columbia ordered an attachment for witnesses who had been subpoenaed. Their defense was that they resided in Maryland. But the court, finding that they resided within 100 miles of the place of holding the court, ordered the attachment to issue.

While the question of procedure in contempt cases is not directly involved in the certification of this cause, there

are nevertheless aspects of procedure which may be influential in determining whether the proceeding to review should have been by writ of error or appeal. The 90th rule of this court is as follows:

> "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

The act of congress with relation to notice in case of injunctions is as follows:

> R. S., Sec. 638. "The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may, upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court."

The 47th and 48th rules are as follows:

47. "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

48. "Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

The Aaron Burr trials conducted before Chief Justice Marshall and Judge Griffin of the district of Virginia in 1807 furnish the earliest construction of the law of contempt in obstructing the administration of justice. The person charged with contempt of court in obstructing the administration of justice was Brig.-Gen. Wilkinson of the United States army, the proceedings being a part of the many questions brought before the court in the trial of

Burr. The proceedings against Burr were commenced March 20, 1807, by bringing the prisoner before Chief Justice Marshall as a committing magistrate, for the preliminary examination. On the proofs then adduced the chief justice refused to hold Burr to answer to the charge of high treason, but committed him on a charge of misdemeanor in preparing and setting on foot a military expedition against the dominions or territory of a prince (the king of Spain) with whom the United States were at peace (Coomb's Trial of Aaron Burr 1; 4 Cranch 455; 25 Fed. Cases No. 14,692A). On May 25, 1807, the grand jury being then in session to consider the charges against Burr and his confederates, the attorney for the United States made a motion in open court to commit Mr. Burr on a charge of high treason, stating that additional evidence, not available at the former hearing would be presented. Objection being made to the power of the court to undertake a further investigation, particularly while the grand jury was in session, the matter was argued at length and on May 26th the court rendered an opinion sustaining its power in the premises. (Coomb's Trial of Aaron Burr 22; 35 Fed. Cases No. 14,692b.) Evidence was heard upon the motion at which hearing the court on May 28th, excluded, for want of proper authentication, the affidavit of Jacob Dunbaugh (Coomb's Trial Aaron Burr 29; 25 Fed. Cases No. 14,-692c). On June 9th Burr applied to the court for a writ of subpoena duces tecum to be directed to the President of the United States, requiring him to produce a certain letter and certain orders issued to the army and navy in

relation to Burr's expedition. This motion having been argued, the court held that the writ might issue. (Coomb's Trial Aaron Burr 37; 25 Fed. Cases No. 14,672d.) Afterward a witness called to prove the authenticity and materiality of a letter in cipher which the prosecution proposed to send to the grand jury, refused to testify on the ground of self-crimination. The question of the privilege of the witness was decided by the court June 18th. (Coomb's Trial Aaron Burr 67; 25 Fed. Cases No. 14,692e.) Subsequently a motion was made by the defendant to attach General Wilkinson for a contempt of court in obstructing the administration of justice and abusing the process of law by coercing and intimidating certain witnesses and procuring their depositions by unlawful means. The first controversy arose as to the form of the motion for an attachment against General Wilkinson. Counsel for the United States insisted upon a specification of the conduct for which the writ was to issue; that if generally expressed as a "contempt of the court" nothing but the spirit of divination could enable him to discern the specific offense charged against him nor prepare for his defense; that the precise circumstances which constituted the offense ought to be particularized. Mr. Burr and his counsel urged the delicacy of the matter as their excuse for not having in the face of their motion the affidavits of James Knox and Chandler Lindsley, in which it was charged that General Wilkinson at New Orleans had offered money to the witnesses to induce their withdrawal of objections to going without the jurisdiction of the court to testify; and upon

the refusal of witnesses to take the money in causing them to be arrested and removed from New Orleans to Virginia to testify as to Burr's expedition. Chief Justice Marshall held that the facts disclosed did not show the obstruction of the administration of justice. He held, also, that an obstruction of administration of justice would be punishable as contempt of court. The motion for an attachment was denied. (Coomb's Trial of Aaron Burr 72; 25 Fed. Cases No. 14,692f.) In 25 Fed. Cases, beginning at page 1, all the Aaron Burr cases are assembled, together with much historical matter relating to his conduct.

In United States v. Carter, 3 Cranch C. C. 423; 25 Fed. Cases No. 14,740, decided in 1829, two women who had been witnesses made affidavits that Louisa Carter, who had by their evidence been convicted, threatened one of the witnesses that "she would give her her dose and that she would be revenged of them both." The threat was made after the trial. The place was the plaza of the court house. Judge Thurston, considering it as a contempt in the presence of the court, it being within the possibility of the hearing of the court, ordered the attachment without a previous rule to show cause. The defendant being brought in upon an attachment and having upon interrogatories confessed the threats and repeated them in the face of the court and avowed her determination to carry them into effect, the court fined her $1.00, ordered her to give security for her good behavior in the sum of $100 and in default thereof committed her to prison.

In United States v. Caton, 1 Cranch C. C. 150; 25 Fed. Cases No. 14,758, it was held to be contempt for a witness to refuse to answer to grand jury and to threaten the jurors. The foreman of the grand jury made the complaint for an attachment which was issued. The facts were proven by the testimony of two of the grand jurors taken orally.

In United States v. Emerson, 4 Cranch C. C. 188; 25 Fed. Cases No. 15,050, decided in 1831, parties to a depending action applied epithets to each other and retired thence to the corridor, where they fought. Officials brought them before the court. Afterward, upon answers to interrogations, the parties were each fined for contempt of court, for misconduct "in the presence of the court or so near there as to obstruct the administration of justice."

In Vose v. Internal Improvement Fund, 2 Woods 647; 28 Fed. Cases No. 17,008, Mr. Justice Bradley denied a motion for an attachment sought against the trustees of the internal improvement fund of Florida who were charged with having violated an injunction in selling certain lands. The facts being established, the answers of the respondents denying any intention to violate the injunction were held sufficient.

In Wartman v. Wartman, Taney 362; 29 Fed. Cases No. 17,210, Chief Justice Taney, at the circuit, applied the proceeding by contempt as a coercive remedy to require a defaulting trustee to bring into court a fund which was being subjected to waste. A motion for an attachment was first made and notice issued therein. After a hearing the

motion was sustained and the respondent being put upon his answer was held guilty and committed until he should comply with the order of the court.

In Whipple v. Hutchinson, 4 Blatchf. 190; 29 Fed. Cases No. 17,517, Mr. Justice Nelson held that where on a motion for an attachment for the violation of an injunction there was doubt whether the writ was served on the defendant the motion would be denied; that the writ ought to contain a concise statement of the acts prohibited and ought not refer to the complaint for the things enjoined, otherwise it could not be the basis of an attachment against any person who had not been served with the bill. This case is cited with numerous others, in United States v. Anon., 21 Fed. Rep. 767, by Judge Hammond to the point that there is no rule in equity, though there is in law, that the defendant's answers to interrogations be taken as true.

In re May, 1 Fed. Rep. 737, where a juror conferred with a litigant, the court held that the accused could purge himself of the contempt, and if he did so falsely the government's remedy was an action for perjury.

In United States v. Anonymous, 21 Fed. Rep. 761, Judge Hammond reviews the authorities which treat of civil and criminal contempt. The right to purge for contempt is held to apply in actions at law. At equity the proceeding being remedial it is proper to hear evidence to determine the extent of the complainant's losses. In a case where the offenses consisted in disturbing the proceedings before a master the offense was held to be such that a fine in favor of the United States was entered.

In re Pitman, 1 Curt. 186. 19 Fed. Cases No. 11,184, decided in 1852, Mr. Justice Curtis construed the amendatory act of March 2, 1831, concerning contempt. He held that the act authorized a court to hear summarily a complaint against the clerk of the court charged with failure to pay the marshal's fees. In his opinion, the proceeding against the clerk was criminal and he should be allowed, in such case, to purge himself with his answers. In noting the distinction between such a case and a case in which the contempt preceeding was in the nature of a civil execution, the court said:

> "Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact by any other evidence. U. S. v. Dodge (Case No. 14,975). 'If the party can clear himself upon oath he is discharged.' 4 Bl. Comm. 286, 287. Whether this rigid rule would be applied to that class of these cases which Blackstone (4 Comm. 285) says 'is to be looked on rather as a civil execution for the benefit of the injured party' it is not necessary here to decide. There are certainly precedents for introduction of other kinds of proof. Kilpatrick v. Vandiver, 2 Rep. Const. Ct. 341; Summers v. Caldwell, 2 Nott & McC. 341; Taylor v. Howren, 1 McCord, 418; Daniel v. Capers, 4 McCord, 237; U. S. v. Mann (Case No. 15,716); Justice of Baldwin Co. v. Bivins, 6 Ga. 575."

In United States v. Dodge, 2 Gall. 313; 25 Fed. Cases No. 14,975, there was a process of attachment against the respondent for a contempt in forcibly rescuing a prisoner in the custody of the marshal, under an indictment for treason. The court held:

> "We can not receive any collateral evidence as to the offense, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear that there is reason to believe the respondent has perjured himself, we will recognize him to answer, at the next term of the court, to such matters as may be found against him. See, as to contempts and practice thereon, Vin. Abr. 'Contempts,' A. B.; Prac. Reg. 99, 100; Gilb. Com. Pl. 20, 21; 12 Mod. 511; Mod. Ca. 73; Com. Dig. 'Chancery,' D, 3; Salk. 321; 4 Bl. Comm. 283; Rex. v. Horsley, 5 Term R. 362; 3 Hawk P. C. bk. 2, c. 22, 1, 32-34; 1 W. Bl. 640; B. Wyatt's Reg. 138; 2 Burrows, 796; Doug. 516; Bac. Abr. 'Attachment B.' B."

That Mr. Bessette was to be dealt with by the court according to the same procedure applied to the cases of the other corespondents is established by the authorities. In Durant v. Washington County, and in Riggs v. Johnson County, 1 Woolw. 377; 8 Fed. Cases No. 4191, Mr. Justice Miller considered several petitions for attachments issued against the various members of a court of supervisors

who were charged with disregard of a writ of mandamus requiring that taxes be levied to pay certain judgments. Mr. Justice Miller said:

> "We are of opinion that the cases of all the supervisors charged with contempt of one writ of mandamus are proper subjects for consolidation into one. The order which the supervisors were required to execute was one order; the action required of them was joint action; and it related to but one subject-matter. Their guilt or innocense of the charge of contempt has its foundation in the same duty and the same disobedience; and though there may be varying defenses or excuses, and a difference in the degree of guilt, the hearing together of these matters is quite as consistent and appropriate as the trial of the guilty and the innocent, charged in the same indictment with the vilest crime; or as the trial in one civil action of many persons charged as joint trespassers. The truth is, that, as a principle, they are jointly and severally guilty, and may be jointly and severally tried as convenience and the discretion of the court may determine. In the cases before us, we are of opinion that justice and convenience will be subserved by a consolidation of all which relate to the disobedience of the same writ of mandamus, and we shall order that they be thus consolidated."

In Fanshawe v. Tracy, 4 Biss. 490; 8 Fed. Cases No. 4643, Judge Drummond construed the ninetieth rule of this court and determined its application to the long-established manner of proceeding in contempt cases in the cir-

cuit court. He held that it was necessary to resort to a supplemental bill in order to bring before the court new parties whom it was desired to bind by the order or decree. He thought that the offense of contempt was not a specific criminal case, but that it partook "of the nature of a criminal offense."

In Gray v. Chicago, etc., R. Company, Woolw. 63; 10 Fed. Cases No. 5713, Mr. Justice Miller states the rule of practice in England to which the ninetieth rule of the court refers, and he discharged the respondents who were brought before him on a writ of attachment, holding that the writ was unlawfully issued. The ruling of Justice Miller is directly opposed by the ruling of Judge Drummond in Fanshawe v. Tracy, *supra*.

One of the earliest cases was Hollingsworth v. Duane, Wall. Sr. 77; 12 Fed Cases No. 6616 (see also Fed. Cases No. 6617), tried in the district of Pennsylvania in 1801 before Judges Tilghman and Griffith, in which it was held to be a criminal contempt for an editor while a cause was depending to publish a newspaper article attacking the character of the judges, jurors and parties to the action. The proper procedure was held to be the filing of an information or petition for a rule against the respondent to show cause why an attachment should not go against him, as for contempt in answer to which rule he might by affidavits controvert, explain or palliate; that he might raise any legal objections and might defend either in person or by counsel. Thereupon the court should determine whether it should discharge the rule or allow the

attachment to go. If the attachment be ordered, then the right of the respondent was either to submit his contempt without interrogatories or he might demand of the prosecutor to file interrogatories stating the questions upon which the contempt turned. Upon his answers under oath to these interrogatories the question of punishment was resolved.

In Ex parte Judson, 3 Blatchf. 89; 14 Fed. Cases No. 7561, Mr. Justice Nelson held that the proper practice was first to move for an attachment on which motion the party could be heard as to the sufficiency of the cause for attachment.

In re Judson, 3 Blatchf. 148; 14 Fed. Cases No. 7563, Judge Betts held that an attachment should not be granted unless the charge of contempt was clearly proven and that when the contempt was not committed in the presence of the court the charge must be proven by affidavit.

In Sickles v. Borden, 4 Blatchf. 14; 22 Fed. Cases No. 12,833, Judge Hall considered a motion for an attachment against the defendants for violation of an injunction. Notice of the motion for an attachment was served on the respondents with a copy of the affidavit. In opposing the motion the court permitted one of the respondents to show as a conclusive defense "that he was not in court when any injunction was ordered and that he had never been served with an order or injunction in the case or with any copy or notice of any such order or injunction." In disposing of the matter Judge Hall said:

> "If the injunction had been properly served on Allen, and had been directed to servants, agents, workmen and employes of the defendants, and had, in terms, restraining such servants, agents, workmen and employes, the very serious question would have been presented, whether persons not parties to the bill could be restrained, under such a general designation, by an injunction issued upon notice only to the parties to the suit. The act of congress requires notice of an application for an injunction; and I am very strongly inclined to the opinion, that, in order to attach for the breach of an injunction, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction."

In United States v. Duane, Wall. Sr. 102; 25 Fed. Cases No. 14,997, tried in 1801, Judge Tilghman stated the facts and the law as follows:

> "A motion was made by the counsel for Levi Hollingsworth, for a rule to show cause why an attachment should not issue against you, grounded on an affidavit of your having made a publication in the newspaper called the Aurora, which was supposed to be a contempt of this court. You appeared in court, on the day appointed for showing cause, and when the prosecutor was about to offer evidence in support of the rule, you voluntarily declared that you confessed yourself the author of the publication in the Aurora. The counsel for the prosecutor were then heard in support of the rule, and

your counsel made an elaborate and ingenious argument against it. The court delivered their opinion yesterday, that you had been guilty of a contempt, and made the rule absolute. You were then informed, that if you wished to answer interrogatories, it was your right and your privilege to have them exhibited by the prosecutor; and that if, by your answer on oath, you cleared yourself of the contempt, it would be received as the truth, notwithstanding the evidence that had been produced against you, and you would be discharged from all further proceedings. You requested time to consider of it, which was granted you; and you have this day declared that you do not wish the interrogatories to be exhibited.

"In order to afford complete security, it is absolutely necessary to restrain and punish offenses of this kind in a summary manner, and in a summary manner they have been punished, from the earliest times to the present day. There is nothing contrary to this mode of proceeding in the constitution of the United States, though it declares that the trial of all crimes shall be by jury. By fair construction this is only to be intended of those crimes which by our former laws and customs had been tried by jury. This construction has been universally received by the courts of the United States, and by the courts of the several states, whose particular constitutions contain a similar provision."

In the proceedings in the case of United States v. Duane, questions as to contempt arose and were disposed of as shown under the titles of Hollingsworth v. Duane,

12 Fed. Cases Nos. 6616, 6617, 6618; United States v. Duane, 25 Fed. Cases No. 14,996 and in United States v. Wayne, 28 Fed. Cases No. 16,654.

THERE MUST BE PRIVITY OF INTEREST IN THE ACTORS IN CIVIL CONTEMPT.

In Dunks v. Grey, 3 Fed. Rep. 862, a father was held for the acts of his son in dealing in an article the sale of which had been enjoined.

In United States v. Memphis and Little Rock R. Co., 6 Fed. Rep. 237, the court punished employes of a railroad company who, in the name and right of their master, did acts in violation of an injunction.

In a note to In re Doolittle, 23 Fed. Rep. 544, Mr. Francis Wharton cites many cases to sustain his views, and says:

> "The first point that is to be discussed in connection with the foregoing opinion is that which is embodied in the following statement: 'Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury.

"The question which is here put, viewing it in its general relations, is one by which the courts have been frequently embarrassed. It is as old as the earliest opinions of Roman jurists. It comes to us as fresh in the cases of today as if it never had been before discussed. Is a man responsible for acts designed by him, but which were, nevertheless, not intended by him? The general rule, I apprehend, may be thus properly stated. When the act in question results as a natural and probable consequence of an intended wrongful act, then the unintended wrong derives its character from the wrong that was intended. So far as concerns questions of general malice this position can not be disputed. A man, for instance, from general malice, tears a rail off of a railway, or drops from a roof a very heavy substance on the pavement where a crowd is passing; and in such cases, if death ensues, he is responsible for murder, though he did not intend to take any one life in particular. This is also the rule in cases of special malice, when the object effected is incidental to the object intended. The same distinction has been accepted with regard to arson, where it is held that where the house of A is burned instead of that of B, as the felon intended, this is arson as much as if the intent had been to burn the house of A. In burglary, also, it is held to be no offense that the goods stolen were not those which the burglar intended to steal. Nor is it a defense to an indictment for stealing that the defendant's intent was not to steal from any particular owner, or that it was to steal from a person who turned out not to be the real owner.

"These conclusions may be sustained on principle. Whatever I ought to regard as incidental to an intended act, I must be regarded as having intended. It is no defense, if I shoot at A on the road and hit B, who happens to be behind A, that I did not actually see B in the spot where he was shot. It was my duty to have seen him, and I am responsible for the consequences. It is true, as I have endeavored elsewhere to show, that the proper way of apportioning the responsibility in such cases is by indicting the offender for shooting at A with intent to kill, and also for the negligent homicide of B. But, however this may be, that the offender in such a case is indictable for the injury that he ought to have seen, can not be questioned.

"The observations that have just been made are particularly applicable to cases of riots arising from the illegal assertion of supposed rights, or redress of supposed grievances. Parties engaging in such a riot are indictable for the natural and probable consequences of the riotous confederacy. If the plan involve a crime, then the offenders are responsible for such crime when committed in execution of the plan.

"The only qualification is that such an act must result from the confederacy. If it does not, the confederates not engaged in it can not be indicted for its commission.

"The rule is thus well stated by Judge Campbell in People v. Knapp [26 Mich. 112]. 'There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should

arise for any one to do it.' In other words, the principle is quite analogous to that of agency, when the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which are not within any joint purpose or combination. Hence it has been held that when several persons are engaged in committing a felony, and, on being detected, run different ways, upon which one of them, in order to get rid of a pursuer, assaults him, the others are not to be considered as indictable for the offense.

"The general rule is that the confederate is not responsible for the crime which is not a probable and natural consequence of the confederacy, unless such crime was committed with his assent. The question whether a party assaulting an officer in ignorance of the latter's official character is indictable for the aggravated offense, is one of greater difficulty. Undoubtedly we have statements made in such cases that if a man intends a wrongful assault, he is indictable for the distinctive offense of assaulting an officer, even though the assault was made in ignorance of the assaulted person's official rank. But there is something very unreasonable in this. A public officer, whether he be a sheriff, or a constable, or a receiver, appointed by a court having jurisdiction, ought to give notice of his position, if he desire to clothe himself with the immunities of that position, at least so far as concerns a prosecution for an assault on himself personally. It is the official person of the assaulted party that creates the offense in such a case. It is true that

if a statute should prescribe 'whoever assaults an officer, even without knowing the person assaulted to be an officer, shall be guilty of the aggravated offense,' etc., it would be no defense that the defendant was ignorant of the officer's official position. But at common law the scienter is necessary to constitute the offense, subject to the qualification that a party is supposed to know what he ought to have known. On the other hand, it is no defense to an indictment for obstructing an officer in his duties (the defendant knowing the officer's official position) that the object of the defendant was to personally chastise the officer, and not to obstruct him in the discharge of his duties. The obstruction was incidental to the intended assault, and therefore the defendant was indictable for the obstruction.

"When we come, however, to discuss the question of an attachment for a contempt, a new state of facts is presented. A court of equity is obliged to enforce its decrees; and if those decrees are disobeyed, the only process to compel obedience is by attachment. This is eminently the case with disobedience to an order of specific conveyance, with disobedience to orders of courts for payment, and with disobedience to an injunction. In such cases it makes no difference what was the intention of the party resisting the order of the court. Whether this resistance were intentional, or whether it were in knowledge of the existence of the decree resisted, or in ignorance thereof, makes no matter. An obstacle stands in the way of the execution of the court's decree, and that obstacle must be removed. Nor is it any defense in such case that the resist-

> ance is to a receiver whom the court appoints. The receiver is as much an officer of the court as is an officer appointed by the court to summon witnesses or to execute final process. Resistance in the first case is as much an obstruction of the process as is the resistance in the last two cases. It may be objected that this bears with unnecessary harshness on persons ignorantly impeding the action of the receivers in a case such as the present. The same objection, however, applies to all other cases of resistance of process; and if the objection were held good, no process whatever could be enforced against parties who are so stupid or so angry as not to understand what is the nature of the authority which they resist. The relief in all such cases is an appeal to the clemency of the court, which will permit no penalty greater than the merits of the case demand. But, whatever be the penalty, the process of the court must be obeyed."

In United States v. Alger, 62 Fed. Rep. 824, Judge Baker quashed an indictment against a striker because it failed to aver that the defendant was "one of the unknown parties that are referred to in the injunction" which the defendant was charged with having violated. The court said of the indictment:

> "It does not allege—and that is the most serious thing to my mind—that, either by his words or his acts, he was engaged in aiding the common object with other members of the American Railway Union. If what this man did was not done to give aid or comfort or encouragement to the object of

> arresting the mails, if it was an independent crime the man was committing, if he wanted to commit arson or robbery without having any connection with these men who were engaged in the interruption of commerce, then he would not be within the terms of the restraining order nor within the law which has been read here—the law of July 2, 1890."

In Hillmon v. Three Insurance Companies, 79 Fed. Rep. 749, Judge Foster refused to hold for contempt McNall, the superintendent of insurance in Kansas, who wrote a letter refusing to permit the companies to do business in Kansas, because they had not "dealt fairly with the plaintiff, Mrs. Hillmon, in refusing to pay the death loss, and in the litigation of the same, pertaining to her deceased husband." The action of Mrs. Hillmon against the insurance companies was pending in Judge Foster's court, at the time the insurance commissioner wrote the letter.

In Chisholm v. Caines, 121 Fed. Rep. 397, Judge Simonton denied that there need be any privity or community of interest between the parties. He held that a person might be guilty of contempt in doing an act which he knew other parties had been prohibited from doing, although the party accused was not a party to the suit and was neither an agent nor servant of men in privity with any of the parties. In such case he is not technically guilty of violation of the injunction, but of an independent act of disrespect of the court and disregard of the decree which constitutes contempt of the court and may be punished as

such without reference to its effect upon the rights of suitors. Judge Simonton reposes his argument on an English case and disregards the limitations which the statutes of the United States impose. Of course a suitor who is enjoined is first adjudged not to have the right which he was asserting. If he is enjoined from entering upon the premises of another it is because he is found by a judicial proceeding not to have in law the right of entry which he was asserting and about to exercise. If he was undertaking to enter without the assertions of a right, then he was criminal; his entry was criminal and courts of equity do not enjoin the commission of a crime. It follows that Judge Simonton's decision means that courts of chancery may punish as criminals those who without being bound to acquiesce in the ruling of the court, fail to respect it.

In Janney v. Pancoast, etc., Co., 124 Fed. Rep. 972, Judges Dallas and J. B. McPherson in a patent suit held that where an order had been made restraining acts of infringement the order was binding upon the persons who were then officers of the company whether they continued in the service of the defendant company or not. A person who was president of the defendant company when the order was entered was punished for contempt because after quitting the defendant company he manufactured the prohibited article on his personal account.

THE COURT SHOULD NOT EXTEND THE INJUNCTION IN CONTEMPT PROCEEDINGS.

In Onderdonk v. Fanning, 2 Fed. Rep. 568, the court refused to entertain proceedings to punish for contempt in a patent suit where the injunction was against the making and sale of one article and the article subsequently made and sold was colorably different.

In Steam Stone Cutter Company v. Windsor Mfg. Co., 3 Fed. Rep. 298, the court refused to entertain proceedings in contempt which proceeded on the theory that the constructive sequestration of property for the purpose of fixing a lien, was equal to an actual attachment of the property whereby it was in custodia legis at the time its possession was disturbed.

In Dinsmore v. L. N. A. & C. R. Co., 3 Fed. Rep. 593, Judge Gresham refused to punish for contempt in a case where it was doubtful whether the act done was such as had been enjoined.

In re Cary, 10 Fed. Rep. 622, the court denied a motion to attach for contempt attorneys of the assignee of a judgment who had sued out a writ of execution on the judgment after an injunction had been entered against the assignor of the judgment restraining him, his agents, servants and others from levying under a particular execution issued on the judgment before the assignment. The court held that the injunction being against the enforcement of the particular writ of execution could not be extended in contempt proceedings so as to constitute an order

against any and all proceedings to collect the judgment. [The editor of the Federal Reporter has appended to the report of this case a collection of cases on contempt.]

In Smith v. Halkyard, 19 Fed. Rep. 602, the court refused to commit the defendants because of a doubt as to whether the acts complained of were within the inhibition of the restraining order.

In Bate Refrigerating Co. v. Gillett et al., 24 Fed Rep. 696, Judge Nixon refused, on a petition for an attachment, to proceed against parties who had not received personal notice of the motion, though their violation of the injunction was apparent.

In Bate Refrigerating Company v. Gillett, 30 Fed. Rep. 685, Judge Wales refused, on a petition for attachment, to proceed against a corporation which pendente lite bought the property which, it was charged, was being used in the violation of an injunction. The court said: "An attachment for contempt is a summary proceeding, and the writ is granted only in cases which are free from any reasonable doubt on the law or facts. California Paving Co. v. Molitor, 113 U. S. 609."

In Temple Pump Co. v. Goss Pump, etc., Co., 31 Fed. Rep. 292, Judge Blodgett refused, in contempt proceedings, to extend the scope of an injunction, so as to make the specifications of a patent include something which was probably different from what the patent contemplated.

In Schlicht Heat, Light, etc., Co. v. Aeolipyle Co., 121 Fed. Rep. 137, Judge Lacombe held that in proceeding to punish for contempt for the violation of an injunction

doubtful questions were not to be resolved against the respondent.

In Creditors v. Cozzens, 6 Fed. Cases No. 3378, Judge Treat held that a restraining order prohibiting bankrupts from transferring their property did not extend to one who had become their assignee prior to the adjudication and that the transfer of the property by the assignee was not a contempt of court. The same rule was followed In re Moses, 17 Fed. Cases No. 9869, and In re Marter, 16 Fed. Cases No. 9143.

In re Judson, 3 Blatchf. 148; 14 Fed. Cases No. 7563, Judge Betts held that an attachment for contempt would not be granted unless a clear case of contempt was established.

In United States v. Kendall, 5 Cranch C. C. 385; 26 Fed. Cases No. 15,518, Judge Cranch refused to sustain a motion for an attachment against the postmaster-general who in complying with a writ of mandamus to pay certain awards had refused to pay interest on the awards. The writ of mandamus had made no direction as to the payment of interest.

THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY FOR COMPENSATING THE INJURED PARTY.

In re Tift, 11 Fed. Rep. 463, decided in 1881, the court took an accounting of the losses resulting from an execution sale made under color of a judgment whose collection

had been enjoined, and fined the convicted parties a sum equal to their adversary's damages. The order was: "It is therefore considered and adjudged that a fine of $3,717.85 be and the same is imposed upon said Iron-clad Manufacturing Company for said misconduct, the same to be paid into the registry of this court within ten days from the date hereof, and to be thence paid over to said Tift or his attorney to satisfy said damages, costs and expenses."

In Searle v. Worden, 13 Fed. Rep. 716, decided in 1881, Mr. Justice Brown, then presiding in the circuit court for the eastern district of Michigan, ascertained the damages of the complaining party. After commenting on a statute of Michigan which authorized the court to indemnify the aggrieved party, and after holding that such a statute could not be applied in a federal court, he said: "But I notice that in several cases the federal courts have adopted an analogous practice and imposed a fine equivalent to the profits made by the defendants and the costs and expenses of the complainant and directed the same to be paid over to the latter by way of reimbursement. In re Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Blatchf. 45." An order was made in the cause requiring the party in contempt to pay his fine into the registry of the court, whence it was to be paid over to the complainant in satisfaction of his damages. This ruling was afterwards, on appeal, held to be an interlocutory order and reviewable on appeal. See Worden v. Searls, 121 U. S. 14.

In Mathews v. Spangerberg, 15 Fed. Rep. 813, decided

in 1883, it was held that when a party in the supposed exercise of his own rights violated an injunction, he should not receive a punitive fine, but should be required to compensate his adversary, and reference was made to a master to ascertain the complainant's damages.

In American Graphaphone Co. v. Walcutt et al., 86 Fed. Rep. 468, Judge Wheeler held the defendants guilty of contempt in violating an injunction which prohibited them from making, using and selling certain sound records. The defense was that the parties accused had been misled by the ambiguity of the order. Judge Wheeler considered the defense as a mitigating circumstance, but nevertheless made a reference to a master to ascertain the profits and damages arising out of the violation. These he ordered the defendants to pay within ten days after the damages should have been ascertained, or on default the defendants were to be committed.

In Economist Furnace Co. v. Wrought-iron Range Co. et al., 86 Fed. Rep. 1010, Judge Baker found that the accused were guilty of violating an injunction, and he fined them $500, "to be paid to the clerk of this court for the use of the complainant, together with the costs of this proceeding to be taxed."

In Indianapolis Water Co. v. American Strawboard Co., 75 Fed. Rep. 972, Judge Baker reviewed the authorities bearing upon contempt as a remedy and contempt as a vindictive or punitive proceeding. The case at bar was one wherein the strawboard company was charged with contempt in violating an injunction which prohibited it from

discharging its offal, or permitting the same to be discharged into White river, to the detriment of the water supply of the city of Indianapolis. Judge Baker said:

> "Counsel for defendants insist that whatever may be the doctrine of the English courts, and of the courts of the several states of the Union, it is settled by decisions of the supreme court that a proceeding whose object is the punishment of a party for the violation of an injunction is a criminal proceeding. In support of this doctrine, New Orleans v. Steamship Co., 20 Wall. 387; Ex parte Kearney, 7 Wheat. 39; Ex parte Robinson, 19 Wall. 505, among others, are cited, and the following statement from the first of these cases is quoted:
>
> " 'Contempt of court is a specific criminal offense. The imposition of a fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment on an indictment for perjury committed in a deposition read at the hearing.'
>
> "A comparison of these decisions with later ones by the same court will show that the principle contended for is inapplicable to the present case. The case of Ex parte Kearney, supra, was an application to the supreme court for a writ of habeas corpus, where a person was imprisoned by the circuit court for the District of Columbia for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied on the ground that the contempt was a criminal offense, and that the court had no appellate jurisdiction in such cases. The case of New Orleans v. Steamship Co., supra, was one

where, in a suit in equity, a circuit court of the United States imposed a fine on a defendant for obtaining, during the pendency of the suit, from a state court, an injunction against the plaintiff as to a matter within the scope of the litigation pending in the federal court. It was said that the proceeding in the state court was unnecessary, unwarranted in law, and grossly disrespectful to the circuit court. The court held that the contempt proceedings were for a criminal offense, and that it had no appellate jurisdiction, for that reason. The case of Ex parte Robinson, supra, was a petition for a mandamus to the judge of the district court for the western district of Arkansas to show cause why he should not be required to vacate an order disbarring the petitioner as an attorney, which disbarment had been adjudged as a punishment for a contempt of court committed in its presence, while sitting judicially. The court held that the contempt was a criminal offense, but the writ was awarded, nevertheless, on the ground that the punishment was unauthorized, and hence the order of disbarment void. In all of these cases the contempts affected the due and orderly administration of justice, and were offenses against public right, which was sought to be vindicated by their punishment. The primary purpose of the proceedings was to punish offenses against the public, represented by its courts. No private interests were directly affected or assailed by these contempts. The later case of Worden v. Searls, 121 U. S. 14, was a suit in equity on a patent, in which, a preliminary injunction having been granted and violated, the circuit court, in proceedings

and by two orders entitled in the suit, found the defendants guilty of contempt, and by one order directed that they pay to the plaintiff $250 'as a fine for said violation,' and the costs of the proceeding, and stand committed till payment; and by the other order directed that the defendants pay a fine of $1,182 to the clerk, to be paid over by him to the plaintiff, 'for damages and costs,' and stand committed till payment,—the $1,182 being made up of $682 profits made by the infringement, and $500 expenses of the plaintiff in the contempt proceeding. On appeal it was insisted that the suppreme court could not review the action of the circuit court in punishing a contempt committed by a violation of the injunction: (1) Because the proceedings were criminal in their character; (2) because the action of the circuit court is, by section 725 of the revised statutes, expressly made discretionary. Both of these contentions were rejected, and the jurisdiction of the court was asserted on the ground that the fines were incidents of the plaintiff's suit, and his right to them was founded on his right to the injunction. And it was further held that the action of the court was not discretionary, in such a sense as to make its order unreviewable. Section 725 of the Revised Statutes of the United States declares that the courts of the United States shall have power to punish, by fine or imprisonment, for contempts of their authority. And among the cases specially enumerated are:

" 'Disobedience or resistance by any officer of the court, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of said courts.'

"Such has always been the power of the courts, both at common law and in equity; and as was said In re Chiles, 22 Wall. 157, 168:

" 'The exercise of this power has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court, or its order; and, second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. Stimson v. Putnam, 41 Vt. 238. In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it.'

"The doctrine deducible from the former class of cases is that, when the contempt proceedings are prosecuted to vindicate a public right, they are criminal offenses, in which the intent is a material and necessary ingredient. Where, however, the proceedings are prosecuted either solely or primarily to enforce and vindicate private rights, which have been secured from violation by an interlocutory or final decree of the court, they are not criminal, but are civil, and remedial in their nature. As was said by Lord Justice Knight-Bruce in Spokes v. Banbury Board of Health, L. R. 1 Eq. 42, same case on appeal 11 Jur. (N. S.) 1011, where the breach of the injunction affects private rights the remedy by proceedings for contempt is a matter of course, due to the complainant by the law of the land, as the means of enforcing

the order. It is quite plain that the complainant can not be protected.

"The remaining question is as to the remedy to to be awarded to the complainant. Where the contempt consists in violating an injunction granted for the protection of the property rights of the complainant, it is said by the supreme court (In Re Chiles, 22 Wall. 157, 158) that the proper punishment is fine or imprisonment until the offending party performs the act required of him, or shows that it is incapable of performance. The only way in which the defendant could, with absolute certainty, keep the refuse of its mill from escaping into the river, would be by ceasing to operate the same. The circumstances here do not seem to me, at this time, to require the infliction of a punishment which would stop the operation of the mill. It is said to be the duty of the court, and within its power, and in accordance with its practice, to commit the offending party to the custody of the marshal until such offending party shall compensate the injured party for the damage sustained by the breach of the injunction. In my judgment, the court has the power to commit the offending party until he shall make compensation to the injured party, in a case where the damages caused by a breach of the injunction are capable of liquidation according to the practice of the court. In the present case, however, the damages are unliquidated, and difficult of ascertainment, and ought not to be settled except by the intervention of a jury. I must therefore decline to ascertain them in this proceeding. It may be that the court would have the power to require the defendant to give security

for the payment of damages to be ascertained by the verdict of a jury. But this case does not seem to call for the exercise of any such power, as the defendant and its general manager are amply able to respond in damages for any injury suffered by the complainant. The breach of the injunction arose from the negligence, and not from the wilfulness, of the defendant and its officers; and it was not known by them that, by negligently suffering or permitting the refuse of the mill to escape into the river, they would be regarded as in contempt for violating the injunction heretofore granted. In view of these facts, it seems to me that the court ought to impose a moderate fine only. As the complainant was fully justified in moving against the defendant and its general manager, it is entitled to costs, with a moderate allowance for its solicitors' fees. Dias v. Mere, 2 Paige 494.

"An order may be prepared, adjudging the American Strawboard Company and C. D. Macy, its general manager, guilty of contempt in disobeying the injunction heretofore granted, and assessing a fine against them of $250, to be paid to the clerk of the court for the use of the complainant, together with the costs of this proceeding, to be taxed."

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, Judge Lowell exhaustively reviewed the authorities and various statutes pertaining to the power to punish for contempt. He held that in chancery the proceeding was purely remedial; that a fine imposed, being a private remedy granted to a civil suitor was not within the pardoning power of

the president; that the order was interlocutory and not subject to that provision of the statute which prohibited a court from vacating a judgment—a rule which would apply if the proceeding were criminal—after the term, and that the prisoner might be discharged under the poor debtor statutes of Massachusetts.

In Wells, etc., Co. v. Oregon, etc., Co., 19 Fed. Rep. 20, the defendant and its general manager were adjudged guilty of contempt for violating an injunction. The court made a reference to a master to ascertain the complainant's losses, with the observation—

> "But as this is a proceeding between the parties to the suit, having a remedial purpose rather than a punitive one, the matter will now be referred to the master to ascertain what loss, expense or injury the plaintiff has sustained by reason of the misconduct of the defendant, with a view of enabling the court to impose, by way of punishment, a corresponding penalty on the defendant for the benefit of the plaintiff and as to any further proceeding the matter is continued until the coming in of the master's report. Craig v. Fisher, supra; Fisher v. Hayes, 6 Fed. Rep. 63; Macauley v. White S. M. Co., 9 Fed. Rep. 698; In re Mullee, 7 Blatchf. 23."

In Mallory, etc., Co. v. Fox, 20 Fed. Rep. 409, Judge Wallace held that he was restrained by the laws of New York from committing for contempt one who failed to perform an order to pay money.

In Roemer v. Neumann, 23 Fed. Rep. 447, Judge Wallace held that proceedings for contempt were so far remedial as that the complainant could select either of three remedies for relief, viz.: He could proceed by contempt, or at law, or in equity.

In Woodruff v. North Bloomfield Gravel Mining Co. et al., 27 Fed. Rep. 795, Judge Sawyer held the gravel mining company for contempt in violating an injunction which prohibited the flooding of other mines and imposed a fine of fifteen hundred dollars, to be paid to the complainant or its solicitors for their compensation in part for large expenses incurred in procuring evidence and prosecuting this proceeding for contempt.

In Spill v. Celluloid Manufacturing Co., 28 Fed. Rep. 870, Judge Wheeler allowed as costs in the main suit the fees of an examiner whose services were required under a reference in contempt proceedings, though the court held that the costs were not taxable under rules in equity as are the costs of depositions for the final hearing.

In re Graves, 29 Fed. Rep. 60, it was sought to order the arrest and removal of Graves from Iowa to Illinois, there to answer in proceedings for contempt of court. It became necessary to ascertain whether the contempt in that particular case was civil or criminal. Graves had been ordered in a civil suit to pay over certain moneys. He refused to comply with the order. Judge Shiras held that the proceeding was for the enforcement of a civil remedy against Graves and that a federal court was without power to require a party to go from one judicial cir-

cuit to another for the purpose of having civil proceedings taken against him, though it could require his arrest and removal if charged with a crime.

In the President ex rel. Moran et al. v. Mayor, etc., of Elizabeth, 40 Fed. Rep. 799, a citation for contempt was directed against the common council of Elizabeth, N. J., to compel obedience to a writ of mandamus which required that taxes be levied to pay a judgment. The court holds that the proceeding is remedial, and he reviews other remedies which were available under the laws of New Jersey, but which are not so efficacious.

In United States v. Taylor, 44 Fed. Rep. 2, on a rule to show cause, Judge Hanford held that a judgment of a territorial court, after the territory became a state, was transferred to the United States Circuit Court, by which the judgment should be enforced by execution, or by contempt proceedings, as the nature of the cause might require.

In Woodruff v. North Bloomfield Gravel Mining Co., 45 Fed. Rep. 129, Judge Hawley made a reference to a master under a petition to attach for contempt certain parties charged with having violated an injunction, and he sustained the master's finding that the facts did not constitute a contempt.

In American Const. Co. v. Jacksonville, etc., R. Co., 52 Fed. Rep. 937, a receiver had been appointed to take possession of the defendant's property, and a restraining order had been entered prohibiting administrative acts by the officers of the defendant. The officers of the company vio-

lated the injunction, and defied the authority of the receiver. The case presents a rare instance of both civil and criminal contempt—civil contempt in the transgression upon the adjudicated rights of the plaintiff, and criminal contempt in defying the officers and process of the court. In determining the question of procedure, Swayne, District Judge, proceeded as if the case were one of criminal contempt.

In re Copenhaver, 54 Fed. Rep. 660, Judge Philips, on a writ of habeas corpus, outlined the history of the rule which allows the federal judiciary to imprison for contempt the proper officers of a municipal corporation who refuse to levy taxes to pay a judgment. It appears from the opinion that St. Clair county, Missouri, was a proper defendant in a United States circuit court, that a writ of mandamus had been obtained by the judgment plaintiff directing that taxes be levied to pay the judgment; that Copenhaver and others were county judges, and as such were the proper officers to make the required levy; that in disregard of the writ of mandamus, they refused to make the levy; that they were cited for contempt and an order of commitment issued against them, committing them to jail until such time as they should consent to make the levy; that without repentance, Copenhaver and others sued out the writ of habeas corpus, seeking their discharge on the ground that their convictions were void. With respect to contempt as a remedy Judge Philips said:

> "This application involves the authority of this court to imprison judges of the state county courts

for refusal to obey the writ of mandamus. It is sufficient to say that this has now been the settled practice, established by decisions of the supreme court of the United States for over 30 years. It is a question which has called forth the best efforts of the ablest lawyers of the republic in its discussion, and on which has been expended a vast wealth of legal and judicial learning. It recieved its quietus in the cause celebre of Riggs v. Johnson Co., 6 Wall. 166. There was nothing political or revolutionary in the history of the establishment of this rule of practice in the federal courts. It was affirmed in a unanimous opinion by the supreme court, presided over by Chief Justice Taney, in 1860, in Knox Co. v. Aspinwall, 24 How. 376; and the final settlement of the question was an able opinion written by Mr. Justice Clifford, and concurred in by Mr. Justice Field, and others; Justice Miller dissenting with characteristic energy and ability. The doctrine sprang from the necessities of the case. As no law authorized the issue of an execution in the instance of a judgment in the United States court against a municipality, directly against the property of a constituent member of the corporation, the writ of mandamus was, ex necessitate, resorted to as the equivalent of an execution, to require the local agency of the state to make the levy as provided by the state statute for raising revenue to cover liabilities of the municipal government; otherwise the federal judiciary would present the anomaly of being provided for in the organic law of the federal government, with unquestionable power and jurisdiction to proceed to judgment in an action by a nonresident citizen

against the county or other municipal organization, and yet without power to execute judgment. As expressed tersely by the supreme court: 'No court having proper jurisdiction and process to compel the satisfaction of its own judgments can be justified in turning its suitors over to another tribunal to obtain justice.' In other words, it would seem to be a travesty of justice that, after conferring on the United States court jurisdiction to render judgment (as congress had the unquestioned right to do), the judgment suitor, as the opposers of the doctrine in question contended, should be turned out to pursue his remedy by another suit on his judgment in the state court. It is not necessary for me to say at this late day in the history of this matter what other remedy congress might have provided to mitigate any supposed evils of the practice in vogue; or what substitute might now be made with justice to both creditor and debtor. But it is proper to say that, unless congress shall wholly strip the courts of the United States of jurisdiction over controversies between citizens of different states whenever a municipality is concerned, it were madness to suppose it, or the federal courts, will ever deny the remedy by mandamus, until some other remedy, equally, if not more, efficacious, is provided."

Judge Philips having been of counsel in the cases which led to the rendition of the original judgment, his opinion presents an instructive array of facts and law bearing upon the principle that contempt proceedings in such cases are purely remedial.

In Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730, Judge Taft reviewed the attitude of the Brotherhood of Locomotive Engineers toward interstate commerce as demonstrated in their effort to boycott a connecting railroad which was in trouble with its employes. The court held that relief could be granted in a court of equity, and made an interesting differentiation of the acts of the engineers with respect to the rights of the complainant: "First in the light of the criminal law; second, with reference to their character as civil wrongs; and third, with reference to the remedies which a court of equity may afford against them." The question came before Judge Taft on a motion to enter, not to vindicate a temporary injunction.

In A. B. Dick Co. v. Henry, 88 Fed. Rep. 80, Judge Lacombe met a distressful situation by imposing a sentence of two days in jail, upon a defendant, who, a second time, violated an injunction in a patent case. The defendant appeared to the contempt proceedings without counsel, and with the sole defense that he was too poor to compensate the plaintiff for the losses it had sustained by reason of his transgressions.

In Rodgers v. Pitt, 89 Fed. Rep. 424, Judge Hawley imposed a penalty of the payment of costs upon a defendant, who, after an injunction against him in a case concerning irrigation, acquired new rights separate and distinct from those assailed by the complaint. The defendant claimed that his newly acquired rights were prior to those of the complainant, and that he had proceeded in

the exercise of his new rights not with the intent of thwarting the order of the court, but for the purpose of having a judicial determination of the rights he had acquired.

In Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Company, 92 Fed. Rep. 774, as punishment for contempt, Judge Philips dismissed a complainant's bill and dissolved a temporary restraining order because the complainant, after the order had been entered, published in the newspapers a perverted construction of the purpose and effect of the injunction.

In United States v. Sweeney et al., 95 Fed. Rep. 434, Judge Rogers goes at length into the remedial nature of contempt in a case against mine workers, and concluded by committing to jail various accused parties, their several terms of imprisonment ranging from ten months down to five months. Judge Rogers seemed to think that the Debs case was controlling, and that a civil suitor would be entitled to the same redress against one who transgressed private rights, as that which the law gave to the United States against those who transgressed the law. Of course the mere punishment of an adversary party can not be compensation to an injured complainant, and if the rule as followed by Judge Rogers were to prevail, the compensatory remedy to suitors furnished by proceedings to punish as for contempt would be rendered nugatory.

In re Reese, 98 Fed. Rep. 984, Judge Thayer, in discharging Reese on a writ of habeas corpus from imprisonment, imposed as a penalty for the violation of an injunction, said:

"It will be readily conceded that, in many contempt proceedings instituted in the federal courts, neither the citizenship of the accused, nor the fact that he is not a party to any case pending in the court whose authority has been set at naught, is of any importance. This is true when a federal court undertakes to punish one who either interferes with its proceedings, obstructs the due execution of its process, or intermeddles with property in its custody. A different rule, however, applies to cases like the one in hand, where the aid of a court of equity is invoked by a private suitor to restrain another from doing a threatened act which is alleged to be wrongful, on the ground that the legal remedy to redress the wrong is inadequate, and complaint is made that a restraining order entered in the case has been disobeyed. In such cases, the order of the chancellor, when made, prohibiting a given act or series of acts, becomes a special law for the governance of the parties to the cause, and such other persons, if there be any, who may assume to do the forbidden act or acts, not in the exercise of an independent right, but merely as the servants or attorneys of those who are named as parties and are expressly enjoined. Chancellor Kent said in Fellows v. Fellows, 4 Johns. Ch. 25: 'I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause, for the purpose of the cause.' And the same doctrine has been enunciated in other cases. Iveson v. Harris, 7 Ves. 256; Schalk v. Schmidt, 14 N. J. Eq. 268; Boyd v. State, 19 Neb. 128, 26 N. W. 925; Robertson v. Tapscott's Adm'r, 81 Va. 533, 549; Watson v. Fuller, 9 How.

Prac. R. 425. See, also, State v. Anderson, 5 Kan. 90; Land Co. v. Elkins, 22 Blatchf. 203, 20 Fed. 545; Vanzandt v. Mining Co., 2 McCrary 642, 48 Fed. 770; 2 Joyce, Inj., p. 1327.

"In accordance with this doctrine, it is the usual practice, when an injunction issues against a corporation or an individual, to restrain the commission of an alleged tort, to prohibit, not only the defendant, but also his servants, employes, and attorneys, from doing the threatened act, and to hold the latter bound by the order, if, with knowledge of its existence, they do that which is forbidden, not in the exercise of an independent right, but in behalf of their principal. People v. Sturtevant, 9 N. Y. 264; People v. Compton, 1 Duer 512, 554; State v. Cutler, 13 Kan. 131; Atlantic & P. Tel. Co. v. Baltimore & O. R. Co., 46 N. Y. Super. Ct. 337, 416, 417; Phillips v. Detroit, 19 Fed. Cas. 512. Expressions are found in some cases, notably in Lennon v. Railway Co., 22 U. S. App. 561, 568, 12 C. C. A. 134, 64 Fed. 320 (although in that case the court was dealing with one who was merely a servant of the party who was enjoined), which give some color to the view that an order enjoining a defendant from doing an act alleged to be tortious binds all other persons not parties to the suit who have knowledge of the order, if they are acting in concert with him, although each claims an individual right to do the thing prohibited, and does not act as the servant or attorney of him who is specifically enjoined. The court is aware of no case, however, and none has been called to its attention, where the proposition last stated, that an injunction of the kind

last mentioned binds every one who has notice of it, has passed into judgment on a state of facts involving its determination, and, in the absence of controlling authority, the principle does not seem to be one which should receive judicial sanction. It is obvious that, if a person may be restrained from doing an act which he claims an individual right to do that is not derivative, without his being made a party to the cause, either by words of specific or general description, then he may be condemned unheard, and deprived of an asserted right without due process of law. The power of a chancellor does not extend to such limits, nor is there any necessity that it should do so."

In re Reese, 107 Fed. Rep. 942, the circuit court of appeals for the eighth circuit was required on appeal to review the action of Judge Thayer (98 Fed. Rep. 984) in releasing Reese on a writ of habeas corpus. The action of Judge Thayer was affirmed by the circuit court of appeals in an opinion which differentiates the cases. The opinion is too long to be reproduced here, and like the letters of St. Luke, it is so well done that it would only be marred by a condensation, and this though the effect of the opinion may be tersely stated.

In Callanan v. Friedman, 101 Fed. Rep. 321, Judge Lacombe held that a decree entered on default was entitled to respectful obedience, and for the flagrant violation of such a decree, in a patent case, the court imposed a fine of $300 which he divided, one-third to the United States and two-thirds to the complainant.

In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. Rep. 873, the circuit court of appeals for the second circuit entertained a writ of error to revise a judgment in contempt in a cause where a judgment defendant had been adjudged guilty and fined $2,000 for violating an injunction, which amount was equally divided between the complainant and the United States. As to that part of the judgment which was remedial, the circuit court of appeals said:

> "The part of the judgment of the circuit court which directed a payment by the clerk to the complainant of one-half of the fine is objected to. The power of the circuit court to direct the payment of a part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been often recognized in the circuit courts, especially in this circuit; and in practice is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise. In re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911; Macaulay v. Machine Co. (C. C.), 9 Fed. 698; In re Tift (D. C.), 11 Fed. 463; In re North Bloomfield Gravel Min. Co. (C. C.), 27 Fed. 795; Wells, Fargo & Co. v. Oregon Ry. & Nav. Co. (C. C.), 19 Fed. 20."

In Royal Trust Company v. Washburn, Bayfield & Iron River Railway Company, 113 Fed. Rep. 531, proceedings to punish for contempt arose out of an effort on the part of the state of Wisconsin and certain of its citizens to prevent the receiver appointed by Judge Bunn from de-

molishing the tracks of the railroad which he was ordered to do by the United States court upon its being ascertained that the road could not be operated by the receiver, except at a loss. Judge Jenkins entertained the proceedings to punish for contempt as a part of the suit in chancery. The point does not, however, appear to have been presented to the court that resistance to the efforts of a receiver to enforce an order of his court is a crime against the administration of justice, and as such is punishable as a criminal contempt. Judge Jenkins held that the various parties charged were guilty of contempt, and he fined some of them $250 each, while others he sentenced to imprisonment for sixty days. As a member of the bar of the circuit court of appeals for the seventh circuit I have learned that these contempt cases are now pending in the circuit court of appeals, on writs of error. It appears to be the understanding of the parties to those proceedings that nothing therein will be done until the supreme court shall have disposed of the questions certified to it in Bessette's case.

In Matheson v. Hanna-Schoellkopf Company, 122 Fed. Rep. 836, Judge J. B. McPherson refused to entertain a petition for contempt, because the petitioner, having knowledge of the alleged transgression of his rights, had waited four years before making any complaint.

In Chicago Directory Company v. United States Directory Company, 123 Fed. Rep. 194, Judge Lacombe equally divided as between the complainant and the United States two fines of one thousand dollars ($1,000.00) im-

posed for the violation of an injunction in a copyright case.

In re Fortunato, 123 Fed. Rep. 622, Judge Holt punished for contempt certain lawyers who, in disregard of an injunction in bankruptcy, caused a state court to punish the bankrupt for a contempt of its authority committed before the proceedings in bankruptcy. The contempt proceedings in the federal court were punitive, but Judge Holt held that the contempt proceedings in the state court were purely remedial.

In Dowagiac Manufacturing Company v. Minnesota, etc., Company, 124 Fed. Rep. 736, Judge Lochren expressed the views that contempt proceedings were in all cases criminal. He was not advised of any authority whereby the proceeding could be regarded as remedial for the purpose of compensating the party who had experienced losses by his adversary's transgressions.

In re Atkinson, 2 Fed. Cases No. 606, Judge McCandless held that the provisions authorizing a court of bankruptcy to restrain proceedings in a state court were remedial and as well for the protection of the creditors as of the bankrupt.

In Sparkman v. Higgins, 2 Blatchf. 29; 22 Fed. Cases No. 13,209, Judge Betts denied a motion for an attachment against parties charged with the violation of an injunction. There was no controversy about the injunction having been violated, and, if the question were one of maintaining the dignity of the court the offense had been committed. But the proceeding being remedial and it ap-

pearing that the plaintiffs had resorted to stratagem to induce a violation of the injunction, the court not only denied the complainants the relief they sought but taxed them with the costs of the proceeding.

In United States v. Beard, 24 Fed. Cases No. 14,551a, the court in admiralty fined respondents who had removed a vessel in defiance of the process of the court. The fine was both punitive and remedial, $500.00 being assessed in favor of the United States, $302.88 in favor of the relator.

In Wartman v. Wartman, Taney 362, 29 Fed. Cases No. 17,210, Chief Justice Taney, at the circuit, applied the proceeding by contempt as a coercive remedy to require a defaulting trustee to bring into court a fund which was being subjected to waste.

In Wetherill v. New Jersey Zinc Company, 1 Ban. & Arden 105, 29 Fed. Cases No. 17,463, Judge McKennan considered the rights of parties on a motion to attach for contempt after a final decree entered in a suit charging the infringement of certain patents. The court said:

> "The affidavits presented in support of this motion fully sustain the alleged violation of the injunction. This is controverted by counter affidavits, and hence it is urged that the motion should be denied, and the question of infringement involved, investigated and determined upon a new bill.
>
> "It is certainly desirable that any adjudication by the court, touching interests of such magnitude as are involved in this proceeding, should be in

such form that it may be susceptible of revision by a superior tribunal. But that is no sufficient reason for withholding from a litigant the benefit of a remedy to which he is entitled, if he establishes a meritorious claim to it, nor would it justify the court in abdicating the discharge of a duty which the law imposes upon it. Not only has a party, in whose favor judicial process has been awarded, right to demand the full measure of protection it was intended to afford him, but, in a more general sense, it is essential to the due administration of justice, that obedience to it should be enforced. If its requirements are wilfully unheeded, a summary method of correction is imperative; on the other hand, if the delinquency, either as to its character or the fact of its commission, is doubtful upon the proofs, such mode of interposition ought not to be applied. This is the import of all the authorities. It is not enough, therefore, to arrest a summary exercise of the power of the court, that the proofs of the violation of its decree are conflicting, or that the thing used by the respondent is, in some of its features, different from the thing whose use is interdicted. The evidence must be carefully weighed, and as it establishes clearly or falls short of establishing a substantial transgression, it is the duty of the court to act or forbear to act accordingly."

In Newport Light Co. v. Newport, 151 U. S. 527, this court gave consideration to the nature of a proceeding to punish for contempt and held it to be remedial, having the qualities of an execution of the decree. Speaking by Mr. Justice Jackson the court said, at page 539:

"In McMicken v. Perin, 20 How. 133, the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment of law which had been affirmed on error and remanded for execution to the circuit court."

FURTHER AS TO THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY TO REQUIRE OBEDIENCE BY COERCION.

In United States v. Sowles, 16 Fed. Rep. 536, the proceeding was coercive to require a bankrupt to deliver up his assets. The order was that he be committed until compliance. The cases are reviewed, showing the antiquity of this attribute of courts.

In Norris v. Hassler, 23 Fed. Rep. 581, a defendant who refused to obey a writ of subpoena ducas tecum was found guilty of contempt, but judgment was suspended, the court saying: "As the object of the proceeding is to compel the defendant to perform an act or duty which appears to be within his power, the judgment to be entered will be largely controlled by his future conduct." The

authority relied upon was United States v. Durling, 4 Biss. 510; 25 Fed. Cas. No. 15,010, in which the proceeding was treated as criminal.

In Bridges v. Sheldon, 7 Fed. Rep. 17, 42, the court in a proceeding in contempt stayed proceedings in a case in Vermont until the plaintiff should furnish evidence of dismissal of an action he had begun by service of process on the defendant while he was in Iowa taking depositions in the Vermont case.

In Bogart v. Electrical Supply Co., 27 Fed. Rep. 722, the court on a motion in the suit held that it was entirely proper to order an attorney to pay the costs which he had unnecessarily imposed upon his client, and that a decent regard for the dignity of the court required that obedience to the order be compelled. The statutes of New York prohibiting imprisonment for debt were held to have no application. The courts had always allowed the summary remedy of an attachment to compel an attorney to observe the duties incident to his professional relations toward his client.

In Southern, etc., Co. v. Houston, etc., R. Co., 27 Fed. Rep. 344, Judge Pardee refused to hold the officers of a bank for contempt in converting to their own use moneys deposited by certain receivers under an order of court, and this notwithstanding the bank might be held for contempt.

In re Ferry, 37 Fed. Rep. 649, Judge Sawyer refused to allow David S. Terry credits for good time while serving out a sentence imposed for contempt of court. The court doubted whether contempt was a criminal offense within

the meaning of the statute. There was no doubt, however, that as the credits were allowed annually, the acts which authorized them had no application to a sentence of only six months.

In Morss v. Domestic Sewing Machine Co., 38 Fed. Rep. 482, Judge Colt refused to impose more than a nominal fine for the violation of an injunction in a case where another federal judge had modified the injunction. It appeared that the modification induced the belief on the part of the defendant that he had the right to do those things of which complaint was made in the contempt proceeding; at least Judge Colt was persuaded that the violation was not intentional.

In Johnson Steel, etc., Co. v. North Branch, etc., Co., 48 Fed. Rep. 196, Judge Reed sustained a citation for contempt and ordered that the rule be not discharged until the defendant, a contumacious witness, had answered certain questions submitted at an examination before a master, and paid the costs of the contempt proceeding.

In Consolidated Roller Mill Co. v. Coombs, 39 Fed. Rep. 803, Mr. Justice Brown, then on the circuit, held that the owner of a patent could not be required to distribute his rights and the court refused to suspend an injunction where it was not clear that the casting out of the patented machine would not so disturb the business of a rolling mill as to inflict upon the defendant losses far in excess of the benefits which would accrue to the complainant. The court allowed twenty days time in which to change the offending machine, and intimated that its

use after that would be met with the coercive remedy of contempt in favor of the complainant and against the offending party.

In Toledo, Ann Arbor, etc., R. Co. v. Pennsylvania et al., 54 Fed. Rep. 746, Judge Ricks, in a proceeding to punish for contempt certain engineers who had violated an injunction against boycotting the Ann Arbor road during a strike of its locomotive engineers, apparently took the view that the proceeding as against one Lennon, an engineer, should be regarded as criminal rather than coercive or remedial, and a fine of fifty dollars and costs was imposed upon conviction. The case seems to follow, without citation, the rule of Judge McCrary in Van Zandt v. Argentine Min. Co., 48 Fed. Rep. 770. The two cases appear in this respect to be at variance with the current of judicial authority.

In re Copenhaver, 54 Fed. Rep. 660, it appeared that a judgment had been duly entered against St. Clair county, Missouri, and thereon a writ of mandamus had been duly issued, to compel the levying of a tax for the payment of the judgment. Copenhaver and others were judges of the county court of St. Clair county, and as such were the proper persons to levy the taxes required. They refused to make the levy, were cited for contempt and imprisoned. On a writ of habeas corpus Judge Philips outlined the history of the rule by which the remedy of contempt is allowed to suitors as a coercive measure in the execution of judgments.

In Sabin v. Fogarty, 70 Fed. Rep. 482, Judge Hanford

held that it was a contempt of his court for a sheriff to take on a writ of replevin at the action of a third party certain live stock which the United States marshal had sold upon process, but had not delivered, to one Burns. The order against the sheriff, Stinson, and the attorney, Lloyd, who represented the third party plaintiff in the action in replevin in the state court, was as follows:

> "The judgment of the court is that the defendants Stinson and Lloyd are guilty of contempt, as charged; and that they shall forthwith pay into the registry of this court, for the benefit of the parties concerned, the full amount for which the property was sold by the marshal, so that the marshal shall be protected, and so that Mr. Burns will be protected, to the amount of $40, paid by him on account of his bid at the sale; and that they each pay a fine of $10 and the cost of this contempt proceeding, and that every day in which they delay to pay into court the amount of money they are required to pay to make up the value of the property taken will be regarded as a continuing and additional contempt, for which there will be a fine of $50 against each of them."

In Animarium Co. v. Bright, 82 Fed. Rep. 197, Judge Kirkpatrick refused to require a sheriff to restore goods taken on a writ of replevin after the goods had been delivered by the marshal to the party against whom a state court issued the writ of replevin. Judge Kirkpatrick held that after their delivery by the marshal, the goods were no longer in the custody of the federal court.

In Davis v. Davis, 90 Fed. Rep. 791, Judge Lowell in a proceeding to punish for contempt a lawyer who refused, at the suit of his former client, to produce papers upon which he held an attorney's lien, ruled that the value of the lien depended upon the sequestration of the papers, and that it could not be destroyed by the summary process of a proceeding to punish for contempt. The rule against the attorney was discharged.

In re Greenberg et al., 106 Fed. Rep. 496, Judge Brown found it difficult in view of the magnitude of perjury to determine exactly the amount of money certain New York bankrupts were holding back, but he felt safe in reducing the amount found by the referee, from $22,000 to $14,000, and ordering the defendants to be committed if they failed to deliver the $14,000 within ten days.

In Smith v. Belford, 106 Fed. Rep. 658, the circuit court of appeals for the sixth circuit sustained the right of a district court to resort to punishment as for contempt to coerce a bankrupt into the delivery of his assets to the trustee.

In Tornanses v. Melsing et al., 106 Fed. Rep. 775, the circuit court of appeals for the eighth circuit resorted to proceedings in contempt to coerce Alexander McKenzie to obey writs of supersedeas allowed by Judge Morrow upon his granting an appeal from certain orders made by Judge Noyes at Nome, Alaska, appointing a receiver for certain gold mines, the order being made prior to the filing of a bill of complaint, and upon a cause of action, as it finally appeared, which was solely in ejectment, and

without any elements of equity. The receiver was committed to jail for six months, in each of the two cases, the court of appeals holding that the resistance of its writs constituted a criminal contempt.

In Champlain Construction Co. v. O'Brien et al., 107 Fed. Rep. 333, Judge Wheeler by the coercive proceeding of contempt compelled obedience to an order made in a state court before removal of the cause to the circuit court for the district of Vermont. The order of the federal court was that the injunction defendant pay an ascertained claim of $982.17 together "with the costs of this proceeding" within thirty days.

In re Nevitt, 117 Fed. Rep. 448, on writ of habeas corpus before Judges Sanborn and Lochren, the court again reviewed the cases of the judges of St. Clair county, Missouri, who are in prison for failure to comply with an order of the federal court, requiring the levy of certain taxes to pay certain judgments. Judge Sanborn in delivering the opinion of the court exhaustively reviews the authorities which differentiate the various classes of contempt. He holds that when the adjudicated rights of a private suitor, as set forth in an order or decree of court, are transgressed, it is the duty of the court to come to the relief of the injured party and to grant him such remedies as are within the power of the court. These may be coercive or compensatory. In the case of the Missouri judges, the relief granted to the complainant was to coerce by imprisonment the judges who refused to make the required tax levy. Judge Sanborn's opinion is itself a terse

digest of the cases, a concise summary of the controlling principles, and it can not be satisfactorily condensed. Doubtless there is not a more luminous exposition of the law in any of the circuit court reports. Among Judge Sanborn's conclusions are the following:

> "Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. Thompson v. Railroad Co., 48 N. J. Eq. 105, 108, 21 Atl. 182; Hendryx v. Fitzpatrick (C. C.), 19 Fed. 810; Ex parte Culliford, 8 Barn. & C. 220; Rex v. Edwards, 9 Barn. & C. 652; People v. Court of Oyer and Terminer, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; Phillips v. Welch, 11 Nev. 187, 190; State v. Knight, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; People v. McKane, 78 Hun 154, 160, 28 N. Y. Supp. 981, 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the

court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. This is the nature of the case under consideration. These petitioners are imprisoned until they comply with the order of the court that they levy the tax to pay in part the judgment of the plaintiff, Douglas, against this county. This plaintiff has the legal right to the enforcement of this order by the coercive power of the court. The power of the president to grant reprieves and pardons of offenses against the United States does not extend to him the authority to release or destroy the civil rights of private individuals, and hence can not authorize him to deprive this plaintiff of his legal right to the enforcement of his mandamus by the commitment of the prisoners until they comply with the lawful order of the court. 13 Peters. Abr., p. 78; 3 Co. Inst. c. 105, pp. 236, 238; 4 Bl. Comm. 285; Jones v. Shore's Ex'rs, 1 Wheat. 471, 474, 4 L. Ed. 136; Van Ness v. Buel, 4 Wheat. 74, 4 L. Ed. 516; U. S. v. Lancaster, 4 Wash. C. C. 66; 26 Fed. Cas. 859; 5 Op. Attys. Gen. 532, 542."

Petersdorf in his Abridgment (volume 13, at page 78) says:

"The king's pardon can not be considered a legal discharge of an attachment for nonpayment of costs or nonperformance of an award; for, though such attachment be carried on in the shape of a criminal process for a contempt of court, yet it is in effect and substantially a civil remedy or execution for a private remedy."

Blackstone, in reciting the various contempts punishable by the courts, says:

(6) "Those committed by parties to any suit, or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause, by nonpayment of costs awarded by the court upon a motion, or by nonobservance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such arbitration. Indeed the attachment for most of this species of contempts, and especially for nonpayment of costs and nonperformance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court; and therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. 4 Bl. Comm. 285.

"In Jones v. Shore's Ex'rs, 1 Wheat. 462, 4 L. Ed. 136, in U. S. v. Lancaster, 4 Wash. C. C. 66, 26 Fed. Cas. 859, and in 5 Op. Attys. Gen. 532, it was held that the president had no authority under his pardoning power to release that portion of fines or penalties for violations of law which

> inured to the benefit of private individuals. And how can this be otherwise? A pardon is a grant, a deed. But a deed does not and can not convey that which the grantor has never had. If it were conceded that the president by his pardon could grant to the petitioners all the right and interest of the United States in these proceedings for contempt, that grant would avail nothing here. The right to the enforcement of this mandamus by these proceedings for contempt is not vested in the United States, or in the president, and therefore they can not grant or release it. It is vested in the plaintiff in this judgment, Joseph M. Douglas. It is the right to the only execution, the only remedy, which the law vouchsafes to him for the collection of his judgment, and no department of the government—executive, legislative, or judicial—can lawfully take, release, or destroy it without paying or securing to him just compensation for his property; for this is his private property."

In re Hausman, 121 Fed. Rep. 984, the circuit court of appeals for the second circuit on a petition for revision of proceedings in bankruptcy held that a party should not be punished for failing to do that which he was unable to do.

In re Allen, 13 Blatchf. 271; 1 Fed. Case No. 208, Judge Shipman held that proceedings to punish for contempt under the former bankruptcy act, were remedial and coercive. He said:

> "Under this theory of the law the practice of the district courts has been to enforce the unobeyed orders of the register by proceedings in contempt

> which are instituted directly upon a neglect to comply with his order. * * * When the contempt consists of a violation of the order of the court and is a contempt not committed in its presence, and the statutes do not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of court or until further order of the court. Green v. Elgie, 8 Jur. pt. 1, p. 187, per Denman, C. J.; opinion of Chancellor Kent In re Yates, 4 Johns. 317; Yates v. Lansing, 4 Johns. 395."

In Thompson v. Scott, 4 Dill 508; 23 Fed. Cases No. 13,975, and prior to the act of congress allowing state courts to entertain actions against receivers appointed by federal courts, Judge Love held that it was criminal contempt to sue in a state court a receiver appointed by a federal court without having first obtained the consent of the federal court to sue. The court however discharged the rule on the respondents filing a stipulation to the effect that they would dismiss the action in the state court.

In United States v. Davis, 5 Cranch, C. C., 622; 25 Fed. Cases No. 14,926, the respondent ran off three slaves, for whose release as freemen petitions of habeas corpus were about to be filed. When the writs went out and were served the respondent made a return which was insufficient and evasive. Being at the time in court, the respondent was adjudged guilty of contempt in obstructing the administration of justice and was "committed to the custody of the marshal until he shall produce the said negroes or be otherwise discharged in due course of law."

THE OFFENSE IS CRIMINAL WHEN COMMITTED AGAINST THE PUBLIC OR THE AGENCIES OF THE PUBLIC AND THE FINE IS PUNITIVE.

In re Ellerbe, 13 Fed. Rep. 530, was a case in which a party had refused to obey a writ of subpoena. Judge McCrary, in considering the case, said: "A refusal to obey the process of a court of the United States is an attempt to obstruct the administration of justice and is plainly an offense against the federal government. A proceeding in contempt in a federal court is a criminal case to be prosecuted in the name of the United States. Riggs v. Supervisors, 1 Woolw. 377; Ex parte Kearney, 7 Wheat. 38. By the express terms of section 725 of the Revised Statutes of the United States the courts of the United States are authoized to punish contempt, and this necessarily implies that it is an offense against the United States. It has frequently been held to be an offense against the United States within the terms of the provision of the constitution which authorizes the president to pardon such offenders. Dixon's case, 3 Op. Atty.-Gen. 622; Conger's case, 4 Op. Atty.-Gen. 317; Rowan & Wells case, Id. 458."

In re Doolittle, 23 Fed. Rep. 544, the court treated as criminal an interference by strikers on one road with property of another railroad which was in the hands of a receiver.

In United States v. Kane, 23 Fed. Rep. 748, Judge Brewer fined certain men for criminal contempt for interfering with a receiver's performance of duties imposed

upon him by a federal court. The proceeding was instituted and prosecuted by the United States. There was no relationship whatsoever between the parties charged with contempt and the parties to the suit in which the receivership was pending, so that the proceedings in contempt had none of the attributes of a proceeding auxiliary to or for the relief of the parties to the suit.

In the United States v. Berry, 24 Fed. Rep. 780, the matter came on to be heard on a petition for discharge of strikers who had been convicted in the western division of the western district of Missouri, of interfering with the operation of the Wabash railroad in the hands of a receiver. The grounds for the petition were that while the convictions were had in the western district of Missouri the contemptuous acts were committed in the eastern district of Missouri. The opinion of Judge Krekel, which appears to have been delivered with the approval of Mr. Justice Brewer, resulted in the discharge of the strikers, the court holding: "The conclusions reached are that the proceedings in contempt are criminal in their nature; that they must be had in court, and, under the law dividing the western district of Missouri, in the division in which the offense was committed. The order will be that all the defendants be discharged, principals and sureties on the recognizance be released, and that the sentences heretofore passed be held for naught."

In Sharon v. Hill, 24 Fed. Rep. 726, the misconduct of a party in attendance before an examiner was held to be a crime and, though Mr. Justice Field and Judge Sawyer

were of opinion that punishment for contempt would lie, the matter was remitted to the grand jury.

In Naumburg v. Hyatt, 24 Fed. Rep. 898, the court held that while it was ordinarily a contempt for creditors adversely to attach property in the hands of a receiver, yet the court should not punish the attaching creditors if "the possession of the property was in no way disturbed and there was no hostile interference with the proceedings in the pending cause."

In Ex Parte Schulenburg, 25 Fed. Rep. 211, Mr. Justice Brown, construed the statute, section 725, concerning contempts, and held that it did not authorize him to punish for contempt a party who caused a writ of garnishment to issue out of a state court, and be served upon a party temporarily in Michigan to attend a trial in the federal court.

In re Higgins et al., 27 Fed. Rep. 443, Judge Pardee held that employes of a railroad which was in the hands of receivers, were officers of the court, and they as well as those who interfered with them were liable as for criminal contempt of court for transgressions against the property.

In Ex Parte Perkins, 29 Fed. Rep. 900, Judge Gresham released on a writ of habeas corpus one Perkins who was committed by a commissioner for contempt of court in refusing to answer questions at a preliminary examination had before the commissioner in a fraudulent election case. Judge Gresham held that a commissioner's power in contempt proceedings was limited to his right to refer the contumacious witness to the district court, where he might be proceeded against as for contempt.

In re Kays, Sheriff, 35 Fed. Rep. 288, a California sheriff was fined for refusing to accept a federal prisoner upon the same terms upon which state prisoners were admitted to the county jail.

In re Terry, 36 Fed. Rep. 419, Mr. Justice Field and Judges Sawyer and Sabin refused to remit a fine upon Terry for assaulting the marshal and other misconduct in court. Terry's petition for remission of the fine averred that he had no wrongful intent. The court held, however, that the intent which the law implied from such misconduct should not be nullified by the mere denial of the transgressor. The offense was further held to be one committed against the law.

In re Birdsong, 39 Fed. Rep. 599, Judge Speer imposed a fine of $50 on a jailer, who, exceeding his authority under a writ of commitment, inflicted cruel and inhuman punishment on a federal prisoner.

In re Sowles, 41 Fed. Rep. 752, an execution defendant seeking to defeat the enforcement of the writ at a sale of property, by printed circulars and by words represented to bidders and observers that the writ was invalid and irregular, and that any one purchasing under it would be sued by him. Judge Wheeler held that the act constituted an unlawful resistance to a lawful writ of the court, rendering the defendant liable to a penalty of $200, payable to the United States, and the costs of the suit, with an order of commitment to be enforced on failure to pay the fine.

In United States v. Murphy, 44 Fed. Rep. 39, Judge

Ross imposed a fine of $100 upon one who caused the arrest of a receiver on the charge that he was committing a nuisance under the laws of California in operating a steam motor company, as he had been by the United States court ordered to operate it.

In re Manning, 44 Fed. Rep. 275, Judge Brown in a New York circuit, construing the statutes as to the extent to which the process of federal courts ran, said: "Such contempts as fall within section 725 of the United States revised statutes are criminal offenses against the United States (Fisher v. Hayes, 19 Blatchf. 13; 6 Fed. Rep. 63; In re Pitman, 1 Curt. 186; New Orleans v. Steamship Co., 20 Wall. 387), and must be unhesitatingly punished."

In Van Zandt v. Argentine Min. Co., 48 Fed. Rep. 770, Judges McCrary and Hallett, in a suit involving the violation by a plaintiff of his own injunction, held that the proceeding was not remedial but criminal in its nature. The ruling would appear to be contrary to the current of authority, but for the circumstance, whatever respect it may be entitled to, that the offender was the party who had obtained the injunction. The matter of reciprocal injunctions is beyond the purpose of my investigation, and I pass the case without further comment. The court refers to Haight v. Lucia, 36 Wis. 355. The case is doubtless one of disobeying the process of the court rather than one of disobeying the injunction.

In the P. I. Nevius, 48 Fed. Rep. 927, in admiralty, Judge Brown in the southern district of New York, held that a vessel owner who steamed away from an officer who

had served a notice of an attachment and libel, was guilty of criminal contempt under the authorities In re Higgins, 27 Fed. Rep. 443, and In re Sowles, 41 Fed. Rep. 752.

In re Lake Erie, etc., Co. v. Bailey, 61 Fed. Rep. 494, Judge Baker was of the opinion that members of the Brotherhood of Locomotive Engineers, who violated an injunction, were guilty of a crime, because the element of conspiracy was present in the circumstance of membership in the brotherhood. The court imposed a vindicative fine for the punishment of the conspiracy. The position taken seems wholly at variance with previous adjudications, because conspiracy was a crime at common law. As early as 1812, the supreme court in United States v. Hudson, 7 Cranch 32, held that circuit courts had no jurisdiction to punish offenses which were crimes at common law. Judge Baker appears to have confused criminal contempt, which is an offense against the court, the right to punish, which is given by the judiciary act of 1789, with the right to punish common law crimes in contempt proceedings. The language of the opinion will not commend it as a judicial utterance and that the views expressed are not consonant with the current of authority is to be expected from the temper of the utterances.

In Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. Rep. 803, Judge Taft had before him one of the so-called Pullman strike cases. In an effort to boycott the Pullman company, the American Railway Union, under the leadership of one Debs, sent Frank W. Phelan to Cincinnati to call out the employes of the railroads, which were hauling the

Pullman coaches in their passenger trains. Among the companies whose employes Phelan sought to call out were those of Samuel L. Felton, as receiver of the Cincinnati, New Orleans and Texas Pacific Ry. Co., the receivership pending in the United States court. An injunction had been issued against Phelan and his associates, to prohibit them from doing the acts which were subsequently done. Judge Taft, with his usual dispassion and thoroughness reviewed the evidence and the law. Upon the evidence he found that Phelan had done the prohibited acts as against property in the hands of a receiver. Upon the law, Judge Taft held that the authorities persuaded him to punish as for criminal contempt. Judge Taft's differentiation of civil and criminal contempt seems to me to be worthy of place as an accepted rule in jurisprudence. He says that if the acts constituting the contempt, would, when directed against the rights of an individual, constitute a cause for civil action, they will when directed against the court or one of its officers constitute a cause of criminal contempt. Judge Taft imposed a penalty of six months imprisonment in the county jail.

In United States v. Jose, 63 Fed. Rep. 951, the defendant was charged with contempt in wresting from the court's receiver of a railroad certain logs on which he, the defendant, had not paid the freight. As to the nature of proof required to convict, the court followed the rule in criminal cases, saying: "Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the

accused, and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts; otherwise the defendant is entitled to go acquit."

In re Aker, 66 Fed. Rep. 290, Judge Knowles held that one who interfered with the operation of a railroad in the hands of a receiver was guilty of the misdemeanor of contempt of the court, whose receiver was obstructed.

In re Summerhayes, 70 Fed. Rep. 769, Judge Morrow held it to be criminal contempt for a grand juror to violate the admonition of the court, and disclose a subject under investigation by a grand jury. The court held that the punishment for contempt was proper, though there was mingled with the transaction other facts which constituted a crime punishable by indictment. The accused was committed to jail for six months.

In re Brule, 71 Fed. Rep. 943, Judge Hawley held it to be a criminal contempt to obstruct the administration of justice by corruptly inducing one known to possess material information, to avoid the writ of subpoena about to be served upon him as a witness. The court held that the offense was punishable either in contempt proceedings or upon an indictment for conspiracy. Proceeding by contempt was deemed the more efficacious, and Brule was sentenced to imprisonment for three months.

In Indianapolis Water Co. v. American Strawboard Co., 75 Fed. Rep. 972, Judge Baker points out the distinctions between criminal and civil contempt. Inasmuch as the case was held to be one in which the proceeding to punish

was remedial, it is more fully digested under that title of this memoranda which pertains to the proceeding as a remedy.

In Stateler v. California National Bank et al., 77 Fed. Rep. 43, Judge Morrow held it to be a contempt of his court for private suitors in a state court to seek to enforce the claims and distribute the assets of an insolvent national bank, the receiver of which had submitted himself and the assets of the bank to the jurisdiction of the federal court. To sustain his court in protecting his jurisdiction, Judge Morrow relied upon the statements of law made by Chief Justice Fuller in In re Tyler, 149 U. S. 164. For its concrete exposition of the law Judge Morrow's opinion is instructive.

In Mackall v. Ratchford et al., 82 Fed. Rep. 41, Judge Goff held striking miners guilty of criminal contempt in violating an injunction, in marching and countermarching along a public highway, the demonstration being, the court held, for the purpose of intimidation. The opinion does not disclose the extent, if any, of the damages sustained by the plaintiff. The defendants were imprisoned for three days. Judge Goff did not cite any authority to sustain his order.

In re Huntley, 85 Fed. Rep. 889, the circuit court of appeals for the ninth circuit, released on a writ of habeas corpus a prisoner who had been convicted and punished with a punitive fine for violating an injunction which the circuit court of appeals held was void for uncertainty.

In Pokegama Sugar-Pine Lumber Co. v. Klamath River

Lumber Co. et al., 86 Fed. Rep. 538, Judge Morrow fined and conditionally ordered the commitment of certain defendants whom he found guilty of criminal contempt in forcibly resisting a marshal who attempted to serve notice of a temporary order.

In Bowers v. Von Schmidt, 87 Fed. Rep. 293, Judge Morrow found the defendant guilty of violating an injunction which prohibited the sale of certain machines. A fine of $50 was imposed with a conditional order of commitment.

In Anderson v. Comptois, 109 Fed. Rep. 971, the circuit court of appeals for the ninth circuit held that Dudley Dubose, an attorney, was guilty of contempt in conspiring with his clients to resist a writ of supersedeas issued by the circuit court of appeals, on the granting of an appeal from a district court in Alaska, which had, without the filing of a complaint therefor, appointed one Alexander McKenzie receiver of certain gold mines at Nome. The accused was sentenced to six months imprisonment. The McKenzie case, to which the conviction of Dubose was incidental, came before the supreme court of the United States on an original petition for a writ of habeas corpus, and the action of the circuit court of appeals was held to be within its powers.

(See In re Alexander McKenzie, petitioner, 180 U. S. 536.)

In United States v. Weber, 114 Fed. Rep. 950, before Judge McDowell, it appeared that the judge of the United States district court for the western division of Virginia

in vacation entered an order whereby certain named persons, not including the defendants in the contempt proceeding, and "all other parties concerned, whose names be hereafter ascertained," were enjoined from entering upon the property of a coal mining company and from committing certain acts with respect to the employes of the receivers of that company, the receivers being in charge under appointment by the federal court. The defendants were charged with having knowingly and intentionally violated the order. Upon conviction the accused were sentenced to various terms of imprisonment.

In re Noyes, 121 Fed. Rep. 210, the circuit court of appeals for the ninth circuit held that it was criminal contempt for the federal court in Alaska to disregard writs of supersedeas, issued out of the court of appeals, and accordingly punished the judge of the Alaska court and those who were found to be conspirators with him.

In United States v. Haggerty, 116 Fed. Rep. 510, and in United States v. Gehr, 116 Fed. Rep. 520, a restraining order had been entered at the suit of the Guaranty Trust Company of New York v. Thomas Haggerty and others. The bill upon which the order was issued had been filed in the United States circuit court for the northern division of West Virginia. The plaintiff was trustee under a mortgage securing the bonds of the Clarksburg Fuel Company of West Virginia. Some of the defendants were citizens and residents of Pennsylvania, others of Ohio, others of Illinois and some of West Virginia. It is not disclosed that there were any pleas to the jurisdiction, so that the di-

versity of citizenship, it would seem, was apparent upon the face of the bill. The restraining order was entered upon the plaintiff's motion, supported by affidavits. Upon a hearing based on a rule to show cause it appeared that at a meeting held, certain of the accused denounced Judge Jackson who had made the order and that the miners who had quit work were urged to make the other miners "lay down their tools and come out." Defiance of the injunction was openly urged, but it does not appear that the advice of the speakers was acted upon. The accused were convicted of contempt for having held the meeting and for having denounced the judge. But for the element of holding this meeting the case would be substantially like the case against Luke E. Lawless, on account of which the impeachment trial of Judge Peck was held in the senate in the 20th session of congress, and which trial was followed by the act of 1831 amending the act concerning contempt. The only punishment inflicted as disclosed by the reports of the cases was ninety days imprisonment of the defendant, Gehr, in the last named case.

In Castner v. Pocahontas Collieries Co., 117 Fed. Rep. 184, Judge McDowell, on a writ of habeas corpus to secure the discharge of prisoners committed to jail by a commissioner, held that it was a crime against the United States to disregard the terms of a temporary restraining order entered in a suit between private parties to establish private rights and grant private redress. After citing New Orleans v. Steamship Company, 20 Wall. 387, which was a case wholly different from the one before him, and supple-

menting that citation with some of like kind from other federal courts, Judge McDowell quotes from Secor v. Singleton, 35 Fed. Rep. 378, as follows: "In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the order is very generally regarded as a proceeding to redress a private injury, in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceeding differing from that of the general public; otherwise the courts will not entertain the information." Judge McDowell differentiates the Secor case and the case he had to decide as follows: "This doctrine is not applicable to the case in hand. The injunction order here forbade acts which are in themselves offenses against the criminal laws of the state. It is a matter of common knowledge that strikes, especially strikes of coal miners, are frequently accompanied by lawless acts of intimidation. The complaint here charges this offense to the petitioners. In such cases the public is interested. The citizens generally are concerned to bring to an end the reign of terror created by the strikers. Certainly in contempts of this character every citizen has a right to make complaint against persons who, in violating the order of the court, at the same time violate the criminal laws of the state. Moreover, section 1014, Rev. St., provides that the procedure for the arrest and examining trial of offenders shall be 'agreeably to the usual mode of process in such state.' Certainly the usual procedure in this state, when there has been an offense

against the criminal law, is for any person knowing the facts to 'swear out' a warrant. I know of no Virginia authority requiring a different course in contempt cases."

Judge McDowell seems to disregard the familiar rule that a court of equity can not enjoin the commission of a crime. The instance is doubtless the only one in the history of federal jurisprudence in which a federal court in chancery has punished violations of the criminal laws of a state. It should be observed also that the parties punished by Judge McDowell were not parties to the suit. The court's views suggest the interesting theory that in such cases the criminal laws of the state supply sufficient notice to the accused, that punishment will follow if the acts prohibited be done.

In Ex parte Richards, 117 Fed. Rep. 658, Judge Keller held that a punitive judgment should be entered against the accused who violated a restraining order entered in a suit between private parties, involving only private rights. He also held that it was not essential to the validity of the restraining order that no subpoena issued upon the bill had been served upon the defendants. He also held that parties should be punished who were not parties to the bill, and also that it was not necessary for the injunction to have been served upon the parties accused, but they would be liable to punishment if they knew of the existence of the order. Judge Keller largely relies upon Bessette's case as an authority.

In Ex parte McLeod, 120 Fed. Rep. 130, Judge Jones, following the Terry and Neagle cases, held that it was a

criminal contempt to assault an officer of the court, at the time in the performance of his duties, but declined to punish the accused because the offense had been allowed to pass sixteen months without being called to the court's attention.

In Chisholm v. Caines, 121 Fed. Rep. 397, Judge Simonton holds that: "A person may be guilty of a contempt of court in doing an act which he knows the court has prohibited by injunction—as by wilfully trespassing on lands, with knowledge that the court had adjudged them to be private property, and had enjoined the defendants in the suit, and 'all persons whomsoever,' from trespassing thereon—although he was not a party to the suit, and is neither the agent or servant of, nor in privity with, any of the parties. In such case he is not technically guilty of a violation of the injunction, but of an independent act of disrespect to the court, and disregard of its decree, which constitutes a contempt of the court, and may be punished as such without reference to its effect upon the rights of the suitors."

Judge Simonton relies upon an English case to support his position. He disregards the fact that federal courts have only delegated powers and that they must be exercised as prescribed by the acts of congress. In the English courts a rule wholly different prevails. Those courts are an agency of the sovereign and they have many of the attributes of sovereignty. In England the people are subjects and the courts may exercise over and against them all the judicial powers and prerogatives which are not denied

to the sovereign by acts of parliment. If Judge Simonton's opinion came before this court in the form of an act of congress it would promptly be declared unconstitutional. It takes property without due process of law. It denies parties the equal protection of the law. Take an illustration: Suppose some labor union became incensed at its lawyer and undertook unfairly to drive him from the occupancy of his office to which his clients were wont to come. If the action of the union became a nuisance the lawyer could get a restraining order protecting him in the occupancy of his office. Suppose while such an order was in effect the lawyer's landlord, not being a party to the suit nor in privity with the labor union, would compel the lawyer to vacate for nonpayment of rent. Would the landlord be lawfully dealt with if punished as for contempt because he had accomplished the result which was denied to the labor union?

In re Fortunato, 123 Fed. Rep. 622, Judge Holt entered a punitive fine against attorneys who, disregarding an order in bankruptcy, caused the bankrupt to be punished by a state court for a prior contempt which he had committed in disregarding an order of the state court. The case is suggestive of the principles ruled upon by this court in the matter of Sachs and Watts, 190 U. S. 1.

In Dowagiac Manufacturing Company v. Minnesota, etc., Company, 124 Fed. Rep. 736, Judge Lochren expressed the opinion that proceedings to punish for contempt were always criminal. As to the use of proceeding for remedial or compensatory purposes he said: "I do not

think the object of contempt proceedings is to obtain damages from one party for the use of the other. Parties can not recover damages they have sustained in this summary manner ordinarily. They must be recovered in an ordinary proceeding. If there are any precedents for recoveries of this kind I am not familiar with them and none has been cited which convinces me that such is the proper proceeding."

In Ex Parte Beebees, 2 Wall., Jr., 127; 3 Fed. Cases No. 1220, Mr. Justice Grier held on a rule for the attachment of a witness, that the court should consider not only the advantages to the party, but, also, the inconveniences to the witness in determining whether there should be a penalty imposed for failing to comply with a writ of subpoena, and where the attendance imposed upon the witness a burden out of proportion to the advantage which would fall onto the party, the court discharged the rule.

In Ex Parte Benedict, 4 West. Law Month. 449; 3 Fed. Cases No. 1292, Judge Hall held that it was a criminal contempt of court for a marshal to obey the order of the secretary of war and in so doing to disregard an order of court. The case is one of the most interesting character and the principles involved are among the most important of any case in American jurisprudence. The controversy arose over the order of Secretary Stanton, of August 8, 1862, wherein it appeared that President Lincoln had attempted to suspend the writ of habeas corpus in certain cases without authority from congress. Benedict had been arrested for seditious utterances. Immediately upon his

arrest he was transported from the district in which he was arrested. His absence from the district made it impossible for the marshal to discharge the writ of habeas corpus, and on that ground alone the marshal was relieved of liability. Judge Hall exhaustively reviews the authorities pertinent to the powers of courts in England and in the United States, and notes the delimitation of common law jurisdiction wrought by the constitution of the United States. The case suggests a danger in holding that any proceeding for contempt is a criminal case within the power of the president to pardon. It suggests how an arbitrary executive, by the use of the pardoning power, could suspend the writ of habeas corpus in defiance of the judiciary.

In Doubleday v. Sherman, 8 Blatchf. 45; 7 Fed. Cases No. 4020, Judge Blatchford, having found the respondent guilty of the violation of an injunction, in determining the punishment, said:

> "The fact of the violation is established, and that it was wilful, although the master reports that the extent of the violation was not shown by the proofs offered before him. The fact that the extent of the violation is not shown, that is, the extent to which the plaintiffs were injured by the violation, is not a good reason for withholding the allowance of counsel fees and disbursements, which were made necessary to establish the violation itself, although it is good reason for not imposing on the defendant a further pecuniary fine by way of indemnity to the plaintiffs. The only doubt I have had is as to

whether a fine or imprisonment ought not to be imposed beyond the costs, counsel fees and disbursements, because of the wilful character of the violation of the injunctions, and to vindicate the process of the court, aside from such indemnity as is afforded to the plaintiffs. But, upon the whole, as the extent of the violation is not shown, so that the court could have some guide furnished thereby as to the proper amount of punishment to be meted out for the wilful character of the violation, I think that the proper decree will be, that the defendant Boas, pay as a fine for contempt, the $3,703.11, and that that sum be awarded to the plaintiffs toward indemnifying them, and that the defendant stand committed until the fine is paid by him."

In King v. Ohio, etc., R. Company and three other cases, 7 Biss. 529; 14 Fed. Cases 7800, decided at Indianapolis in 1877, Judge Drummond held that it was criminal contempt for strikers to interfere with the operation of railroads which were in the hands of receivers. The case is the earliest one I have been able to find on this particular question of fact. In his statement of his opinion the court treats the question as one of first impression and cites no authorities. The defendants upon conviction were sentenced to three months imprisonment subject to the further order of the court.

In re Mullee, 7 Blatchf. 23; 17 Fed. Cases No. 9911, Judge Blatchford held that the violation of an injunction so far partook of a criminal case as that a conviction therefor could be relieved only by the pardoning power of the

president. This case has been much cited and has been the leading authority in those courts which hold contempt of court to be a crime. In other courts the case is no longer regarded as an authority. The basis of criticism of Judge Blatchford's holding is that in so far as contempt of court is remedial either to coerce a civil litigant to do an act necessary to the administration of justice or to compensate an injured party, the order of conviction is a mere interlocutory order in a civil suit which the president has no more right to release than he would have to release a civil judgment which did not belong to him. If the president undertook such an act he would be giving one man's property to another without due process of law.

In Secor v. Toledo, etc., R. Company, 7 Biss. 513; 21 Fed. Cases No. 12,605, Judge Drummond reiterated his statement of the law made in King v. Ohio, etc., R. Company, *supra* (14 Fed. Cases No. 7800), and held that it was criminal contempt for strikers to interfere with the operation of a railroad in the hands of a receiver.

In Thompson v. Scott, 4 Dill. 508; 23 Fed. Cases No. 13,975, and prior to the act of congress allowing state courts to entertain actions against receivers appointed by federal courts, Judge Love held that it was criminal contempt to sue in a state court a receiver appointed by a federal court, without having first obtained the consent of the federal court to sue.

In United States v. DeVaughn, 3 Cranch, C. C. 84; 25 Fed. Cases No. 14,952, a venireman was asked if and answered that he, "had formed and delivered an opinion as

to the guilt of the defendant upon this indictment," and he said that he had done this since he had been served with summons to answer as a venireman, his hope at the time being that such conduct would relieve him from jury service. The court held that the conduct of the venireman was in contempt of court because it tended to obstruct the administration of justice. The venireman was fined $50.00 and excused from jury service.

Cases Arising Under the Interstate Commerce Act and Wherein the United States Appears as a Civil Litigant.

On July 2, 1890 (26 Stat. 209), congress passed an act concerning contracts, combinations and conspiracies in restraint of trade or commerce among the several others or with foreign nations. The fourth section of that act reads as follows:

> "Section 4: The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the

> court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The act was resorted to and construed as early as 1893, but its importance was not emphasized until in 1894, when a controversy between the Pullman company and its employes at Chicago was taken up by an organization of railroad employes federated under the name "The American Railway Union." When the situation at Chicago became intolerable to the public, the attorney-general of the United States directed the filing of bills in various United States circuit courts to restrain the members of the American Railway Union and their abettors from the commission of those acts which were being constantly resorted to for the purpose of forcing the various railways of the country to compel the Pullman company to settle its difference with its employes. In each of the courts in which issues of law were joined on the bills so filed the judges went at length into the nature of the suit and the purposes to be attained thereby. The controlling idea in these various expositions of the law was that the United States as a civil suitor was taking recourse to chancery for the purpose of abating the nuisance that existed in the obstruction of the highways of interstate commerce. The proceeding was purely remedial, and the chancery practice was followed throughout. The leading cases in the circuit courts under this act of

congress, in the order of their apparent priority, are United States v. Workingmen's Amalgamated Council, submitted to Judge Billings at New Orleans, March 25, 1893 (54 Fed. Rep. 994); approved on appeal (57 Fed. Rep. 85); Toledo, etc., R. Co. v. Pennsylvania Co., submitted to Judge Ricks at Toledo, March 25, 1893, (54 Fed. Rep. 746); Id. submitted to Judge Taft at Cincinnati April 3, 1893, (54 Fed. Rep. 730); United States v. Elliott, submitted to Judge Thayer at St. Louis, July 6, 1894 (62 Fed. Rep. 801); approved in a ruling on a demurrer to the bill by Judge Philips, October 24, 1894 (64 Fed. Rep. 27); United States v. Alger, submitted to Judge Baker at Indianapolis, July 12, 1894 (62 Fed. Rep. 824).

The United States v. Debs, 64 Fed. Rep. 724, is sui generis. The restraining order was entered upon the several petitions of the United States and of the receivers of the Atchison, Topeka & Santa Fe railroad appointed in the suit against that road by the Union Trust Company.

Inasmuch as the Debs case is the authority of last resort for the great number of contempt cases which has since been prosecuted throughout the United States, it may be well to note that the writ of injunction was entered and issued not only as against Debs, Howard, Rogers, Kiliker and the American Railway Union, but also against "all persons combining and conspiring with them and all persons whomsoever." All were alike commanded and enjoined "to desist and refrain" from certain specified acts, and "from ordering, directing, aiding, assisting or abetting in any manner whatsoever, any person or persons to

commit any or either of the acts aforesaid." (64 Fed. Rep., pp. 726-727.) The order was so general in its scope as to parties that it may be said to have applied to any one of the general public whose conduct came within the purview of the acts specified and the scope of those acts was as broad as to include any and every sort of agression.

The following cases are sometimes popularly confused with proceedings taken under the act of July 2, 1890, viz.: Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. Rep. 803, in which Frank W. Phelan was committed to jail by Judge Taft for interfering with Receiver Felton in the operation of a railroad; Arthur v. Oakes, 63 Fed. Rep. 310; These last mentioned cases all grew out of receiverships of railroads.

The Debs case came to this court first on a writ of error, which was dismissed for want of jurisdiction, Jan. 17, 1895 (159 U. S., p. 251), and then on a writ of habeas corpus, in which the petition for discharge was denied May 27, 1895 (158 U. S. 564). The Debs case on the writ of habeas corpus has been cited upon various propositions, as follows:

Postoffice.—Congress having assumed control over mails and commerce, may prevent unlawful interference. Approved in Addyston Pipe, etc., Co. v. United States, 175 U. S. 230, affirming 85 Fed. Rep. 271, 54 U. S. App. 776, enjoining combination to keep up price of pipe; dissenting opinion in United States v. Freight Assn., 166 U. S. 356, arguendo.

Commerce.—Congress may prohibit interference with commerce and mail transportation, and prosecute by indictment. Approved in United States v. Freight Assn., 166 U. S. 343, enjoining unlawful combination affecting commerce; North Bloomfield, etc., Min. Co. v. United States, 88 Fed. Rep. 675, 59 U. S. App. 395, affirming 81 Fed. Rep. 248, upholding act regulating hydraulic mining for protection of navigable rivers; Clune v. United States, 159 U. S. 592, arguendo. Distinguished in United States v. Joint Traffic Assn., 76 Fed. Rep. 898, United States can not enjoin railroad association from affecting agreement alleged illegal under interstate commerce law.

Nuisance.—Public nuisance, such as obstruction of highway, may be abated by government. Approved in American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep. 614, and Vegelahn v. Guntner, 167 Mass. 99, 57 Am. St. Rep. 446, 35 L. R. A. 724, maintaining patrol to prevent workmen entering plaintiff's employ may be enjoined as obstruction to street. Equity may redress public nuisance by injunction. Distinguished in State v. Patterson, 14 Tex. Civ. App. 469, refusing to enjoin public gaming house.

Injunction.—In general, equity can not enjoin commission of crimes. Approved in Rhodes, etc., Mfg. Co. v. New Hampshire, 70 Fed. Rep. 723, federal court can not enjoin State officials from prosecuting criminal proceedings under law alleged unconstitutional; Taylor v. Kercheval, 82 Fed. Rep. 499, court of equity can not restrain marshal from removing deputy; State v. Patterson, 14

Tex. Civ. App. 470, nonenforcement of law does not justify equity in enjoining commission of offense of keeping gambling house; Consolidated Steel Co. v. Murray, 80 Fed. Rep. 828, arguendo. Injunction may issue to prevent interference with property rights violating criminal laws. Approved in Consolidated Steel, etc., Co. v. Murray, 80 Fed. Rep. 827, enjoining unlawful conspiracy by members of labor unions to interfere with plaintiff's business; Nashville, etc., Ry. v. McConnell, 82 Fed. Rep. 77, novelty of use for which asked is not fatal objection to issuance of injunction; American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep., 613, 615, enjoining interference with employes by strikers; United States v. Sweeney, 95 Fed. Rep. 446, punishing violation of injunction against strikers; Gulf, etc., Ry. v. Miami S. S. Co., 86 Fed. App. 421, 52 U. S. App. 759, arguendo. See 61 Am. St. Rep. 711, note. Court issuing injunction has power to inquire into disobedience thereof. Approved in Pokegama, etc., Lumber Co. v. Klamath River Lumber, etc., Co., 86 Fed. Rep. 539, advice of counsel is no defense to violation of restraining order; Nassau Elec. R. R. v. Sprague Elec. Ry., etc., Co., 95 Fed. Rep. 415, order fining for violation of preliminary injunction is not reviewable except upon final appeal: United States v. Sweeney, 95 Fed. Rep. 447, courts have power and duty to punish violations of their injunctions; American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep. 604, arguendo. Enforcing injunction by contempt proceedings is not executing criminal law, nor depriving party of jury rights.

Approved in United States v. Sweeney, 95 Fed. Rep. 449; violating injunction is not entitled to jury trial; State v. Markuson, 5 N. Dak. 158, one charged with contempt is not entitled to jury trial. United States has jurisdiction over every foot of soil within its territory. Approved in United States v. Flourney, etc., Real Estate Co., 69 Fed. Rep. 893, upholding United States jurisdiction over Indian reservations. Penalty for violating injunction is not substitute for prosecution for crime then committed. Approved In re Chapman, 166 U. S. 672, provision making refusal to testify before Congress a misdemeanor is valid, although refusal is also punishable as contempt.

Habeas Corpus.—Facts found by court investigating disobedience of injunction are not reviewable on habeas corpus. Approved In re Chetwood, 165 U. S. 462, judgments for contempt are not reviewable on error or appeal, but by certiorari; Tinsley v. Anderson, 171 U. S. 105, habeas corpus can not be used as writ of error to review contempt commitment.

Miscellaneous.—Cited in Butler v. Fayerweather, 91 Fed. Rep. 458, 63 U. S. App. 123, order committing witness for refusal to testify is final for appeal; Doane v. Lake Street El. R. R., 165 Ill. 519, 56 Am. St. Rep. 270, 36 L. R. A. 103, mere diminution, without irreparable injury, is not ground for injunction.

The Debs case on writ of error has been followed in this court, In re Chetwood, 165 U. S. 443, 462, and in Tinsley v. Anderson, 171 U. S. 101, 105, to the point that contempts are not reviewable in this court on writ of error.

Each of the subsequent citations is made in consideration of the particular issue before this court and in no case has the issue been decided by this court as to the right of review in the circuit court of appeals, in a case of so-called criminal, punitive or public contempt.

In United States v. Cassidy, 67 Fed. Rep. 698, appears Judge Morrow's charge to the jury in the trial of the criminal conspiracy cases which brought up the entire strike, so far as the Pacific coast was concerned. The charge is accredited with being the longest ever delivered in a criminal case in this country, but as it does not apply to contempt, no excerpts from it are made.

The Circuit Court of Appeals Act Gives the Right to a Review by Appeal or Writ of Error According to the Nature of the Principal Case in the Court Below

The appellant contends that his right to an appellate review by appeal, rather than by writ of error, is determined by the fact that the suit in which the attachment against him was issued was in equity. This court has many times asserted that the nature of the principal cause will fix the nature, and even the jurisdiction, of all subordinate proceedings. Rouse v. Letcher, 156 U. S. 47, and cases cited; Rouse v. Hornsby, 161 U. S. 588; Pope v. Louisville, etc., R. Company, 173 U. S. 573, 577, 578; Baggs v. Martin, 179 U. S. 206.

The act of congress of March 3, 1891, establishing circuit courts of appeals, and defining and regulating the jurisdiction of the courts of the United States, 26 Stat. 826, C. 517, was passed "to facilitate the prompt disposition of cases in this court and to relieve it of the oppressive burden of general litigation, which impeded the examination of cases of public concern and operated to delay suitors"—Chief Justice Fuller in Lau Ow Bew v. United States, 144 U. S. 47, at page 55. And at page 56 this court further says:

> "By section 6, the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or by writ of error, final decisions of the circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed. McLish v. Roff, 141 U. S. 661, 666.
>
> "The words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause."

In re Schlesinger, 102 Fed. Rep. 117, the circuit court of appeals for the second circuit seems to have pursued a

method not contemplated by the original act of Congress concerning circuit courts of appeals. Schlesinger, a bankrupt, had been ordered by the district court to deliver certain money to the trustee. The order was not obeyed. Pending proceedings in the district court to punish for contempt, the court of appeals entertained a petition to review the order of the district court. The proceeding in the circuit court of appeals may demonstrate the extent to which the right of an appellate review was enlarged by the amendment of February 18, 1895 (28 U. S. St. 666), or by the bankruptcy act.

In re Woods, 143 U. S. 202, 206, this court, in speaking of the act creating the circuit court of appeals and the supervisory power of the supreme court, said, through the chief justice:

> "But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

See also Forsyth v. Hammond, 166 U. S. 506, 512; Warner v. New Orleans, 167 U. S. 467, 474.

> "The fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals of another, under the same conditions, might furnish ground for a cer-

tiorari." Chief Justice Fuller in Columbus Watch Company v. Robbins, 148 U. S. 266, 270.

The appellate procedure sought to be pursued in this case is that prescribed by this court in United States v. Jahn, 155 U. S. 109. In that case the chief justice, at page 114, says:

> "Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it; (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court; (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently,

> if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

In the same case this court holds (p. 112) that section six of the act creating the circuit court of appeals confers upon that court jurisdiction in all cases save those which are reserved to this court by section five. There is no class of cases unallotted or unassigned. United States v. American Bell Telephone Co., 159 U. S. 548, 551; Folsom v. United States, 160 U. S. 121; United States v. Rider, 163 U. S. 133, 139, 140; Robinson v. Caldwell, 165 U. S. 359; American Sugar, etc., Company v. New Orleans, 181 U. S. 277, 280.

FINAL AND INTERLOCUTORY ORDERS IN THE SUIT. CONTEMPT PROCEEDINGS ARE INTERLOCUTORY IN EQUITY AND HAVE THE LEGAL EFFECT OF AN ORDER CONTINUING THE INJUNCTION.

In Fisher v. Hayes, 6 Fed. Rep. 63, Judge Blatchford held that though the order of commitment was made in a suit in chancery, it was nevertheless a final judgment in a distinct criminal case. The court said:

> "It is well settled that contempt of court is a specific criminal offense, and that the imposition of

a fine for a contempt is a judgment in a criminal case. New Orleans v. Steamship Co., 20 Wall. 387, 392. Although there has as yet been neither an interlocutory nor a final decree on the merits in this suit, yet the order imposing the fine for the contempt was a final order or judgment as to the matter of the contempt. The last order as to that matter was made prior to the April term, 1880. Since it was made the April term, 1880, has begun and ended, and we are now in the October term, 1880. The defendant's motion has not been made till in the present term. The general power of the court over its own judgments, orders, and decrees in civil and criminal cases, during the existence of the term at which they are first made, is held to be undeniable (Ex parte Lange, 18 Wall. 163, 167), and it is further held that the power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made. Bank of United States v. Moss, 6 How. 31; The Bank v. Labitut, 1 Woods 11. In U. S. v. Moss it was held to be too late after final judgment and at the next term, and by motion only, to set aside a judgment on account of a supposed want of jurisdiction; and the authorities cited in that case show it to be well settled that no error of law or fact, if any, not involving jurisdiction, committed by this court in making the order now sought to be vacated, can be rectified by this court on this motion."

This cause afterwards came before this court on a writ of error (Fisher v. Hayes, 102 U. S. 121). This court speaking by Chief Justice Wait, said:

> "If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only."

In Bridges v. Sheldon, 7 Fed. Rep. 17, the court stayed a writ of execution in favor of a judgment plaintiff until he should dismiss an action in a state court in which he had caused the writ of summons to be served on the judgment defendant while in attendance upon the federal court.

In Searle v. Worden, 13 Fed. Rep. 716, Mr. Justice Brown, then on the circuit, entertained proceedings in contempt in a patent suit; fined a guilty party an amount equal to his profits made in violating an injunction, and ordered that the fine be paid to the party aggrieved. On appeal to this court it was held that the judgment in the contempt proceeding was a mere interlocutory order or decree and reviewable on appeal. (Worden v. Searle, 121 U. S. 14.)

In United States v. Atchison, etc., R. Co., 16 Fed. Rep. 853, Judge McCrary held that it was improper to take an accounting because that was "in the nature of further relief to the complainant."

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, Judge Lowell held that the order of commitment was interlocutory and subject to be reopened after the term, a power the court could not exercise if the judgment were a final

one in a criminal case. The learned judge exhaustively reviews the statutes and authorities.

In Burr v. Kimbark, 29 Fed Rep. 428, the defendants were charged, in proceedings to punish for contempt, with having violated an injunction. Their answer was in effect that their acts in the premises were in the exercise of rights separate and distinct from those involved by the injunction, and that the complainant had no right to assert the claims he was putting forth in the proceedings to punish for contempt. In deciding the case, Judge Blodgett passed upon the rights asserted in the answer, and held that while their ultimate determination must await the final decision of the suit, nevertheless there had been a violation of the injunction.

In Temple Pump Co. v. Goss Pump Co., 31 Fed. Rep. 292, Judge Blodgett held that in case the fact of infringement of a patent was doubtful, the complainant should be required to proceed by a separate suit rather than have the matter of infringement determined in a contempt proceeding.

In Howard v. Mast, etc., Co., 33 Fed. Rep. 867, Judge Nelson construed an injunction but refused to extend it in contempt proceedings so as to include a device not described in the original bill. He held that an independent suit would have to be brought in order to protect such interests as the complainants might have as against the new devices.

In Clark v. Wilson, 33 Fed. Rep. 331, Judge Lacombe refused to punish for contempt a party to a suit who, upon

an examination before a master, answered that he had not manufactured or sold infringing articles. The court held that it was the duty of the master under the reference to ascertain from the respondent's books and business what he had been doing, and that the answer was not, therefore, impertinent. The court instructed the master to proceed in the ascertainment of facts.

In Ulman v. Ritter, 72 Fed. Rep. 1000, Judge Jackson fined Ritter $100 for violating an injunction, and upon the same hearing denied a petition to modify the order previously made, but continued it as a temporary injunction. The opinion does not disclose whether the fine was due to the complainant, or to the United States, though the court seems to have regarded the proceedings as remedial, for he allowed an execution to issue after ten days, to enforce the collection of the fine.

This court has repeatedly held that an order in a suit in equity committing for contempt is an interlocutory order. In Newport Light Co. v. Newport, 151 U. S. 527 this court said, on page 539:

> "In Hayes v. Fischer, 102 U. S. 121, 122, an injunction was granted. Complaint was made against Hayes for a violation thereof, and proceedings were instituted against him for contempt, which resulted in an order by the court that he pay a certain fine, and stand committed until the order was obeyed. To reverse this order, Hayes sued out a writ of error to this court, which the defendant in error moved to dismiss, on the ground that such proceedings in the circuit court could not

be re-examined by this court. The court, speaking by Mr. Chief Justice Waite, said: 'If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it can not be re-examined here either by writ of error or appeal. This was decided more than fifty years ago, in Ex parte Kearney, 7 Wheat. 38, and the rule then established was followed as late as New Orleans v. Steamship Company, 20 Wall. 387.' The court held that it had no jurisdiction, and dismissed the writ of error."

MEANING OF THE WORD "CASE," AND HEREIN REFERENCE IS MADE TO PROCEEDINGS APART FROM THE ENFORCEMENT OF CIVIL REMEDIES.

In the lexicography of jurisprudence, the word "case" seems to have a well settled meaning. In King v. McLean Asylum, etc., 64 Fed. Rep. 331, the circuit court of appeals for the first circuit gives an interesting and instructive review of the use of the word. In applying quotations from this court, Judge Putnam, speaking the opinion of the court of appeals, at page 339, says:

"In Smith v. Adams, 130 U. S. 167, Mr. Justice Field groups together, within the same quotation

marks, the words 'cases' and 'controversies,' as though they were entirely interchangeable, and he says (page 173, 130 U. S.): 'Whenever the claim or contention of a party takes such a form that a judicial power is capable of acting upon it, then it has become a case or controversy.' In Interstate Commerce Commission v. Brimson, 154 U. S. 447, the supreme court cites, on page 475, 154 U. S., with approval, this phraseology of Mr. Justice Field, and itself, on the same page, and on page 478, 154 U. S., uses the same words as interchangeable. It must be admitted that both of these decisions should be classed as relating to cases in law and equity arising under the laws of the United States. These expressions, therefore, so far as the case at bar is concerned, might be regarded as dicta, yet the cases touching the writ of habeas corpus itself come directly in point. In Holmes v. Jennison, 14 Pet. 540, it was held that this proceeding constitutes a 'suit,' within the meaning of that word, as used in the judiciary act of 1789, sec. 25 (1 Stat. 85). In Kurtz v. Moffitt, 115 U. S. 487, the court, on page 494, 115 U. S. , said: 'A writ of habeas corpus sued out by one arrested for a crime is a civil suit or proceeding, brought by him to assert the civil right of personal liberty against those who are holding him in custody as a criminal.' Ex parte Milligan, 4 Wall. 2, is still more in point. On page 112 the court said: 'In any legal sense, "action," "suit," and "cause" are convertible terms.' Milligan supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for

> that purpose was his 'cause or suit.' The court goes on at considerable length to develop this proposition. Thus it was determined in advance that the pending case is a suit, and therefore a controversy, and also that it is the suit, not of the state, but of the petitioner."

In New Orleans v. Steamship Company, 20 Wall. 387, 392, the supreme court said: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

"Contempt of court is a specific criminal offense." In re Swan, 150 U. S. 637, 652.

In United States v. Jacobi, 1 Flip. 108, 26 Fed. Cases No. 15,460, decided in 1871, Judge Withey held on a motion to arrest and remove Jacobi from Tennessee to Arkansas that the respondent in wilfully disregarding a writ of subpoena issued by the federal court in Arkansas had committed a crime against the United States. The court reviews the older authorities which hold that a conviction for contempt is a judgment in a distinct criminal case, and says that the facts under consideration show as distinct a right on the part of the United States to arrest and remove as there "would be in any other case of crime."

Such being the meaning of the word "case," at the time congress passed the act creating the circuit court of appeals and distributing the jurisdiction of "cases," it follows that "cases" of contempt were contemplated by congress in its designation given in the clause 'in all other cases,' and that the right to an appellate review was thereby

given to parties and the jurisdiction to review was vested in the circuit court of appeals.

TABLE CONTAINING AN ABSTRACT OF CONTEMPT CASES IN CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, ARRANGED (1) GEOGRAPHICALLY AND (2) ACCORDING TO STATUTORY CAUSES OF CONTEMPT, AND SHOWING HOW THE CASES WERE DISPOSED OF.

CIRCUIT.	Misbehavior of Persons.	Misbehavior of Officers.	Disobeying Process.	Disobeying Injunctions.	Disobeying Orders (Labor).	Interference With Property.	Discharged.	Coercive Remedy.	Compensatory Remedy.	Punitive Remedy.	Compensatory and Punitive.	Motions Denied.	Total.
First	3	1	...	4	...	...	3	...	2	2	...	1	8
Second	4	1	7	26	...	3	5	7	14	8	5	3	41
Third	12	...	7	9	...	2	3	6	2	11	1	6	30
Fourth	1	1	2	3	5	...	...	2	...	8	...	2	12
Fifth	2	1	1	...	...	1	1	...	...	3	...	1	5
Sixth	2	1	3	5	4	2	1	3	2	7	2	1	17
Seventh	2	...	...	12	5	1	4	2	3	7	2	2	20
Eighth	2	1	8	10	2	3	4	2	2	16	1	1	26
Ninth	6	1	6	6	...	2	...	2	6	10	2	1	21
Total	34	7	34	75	16	14	21	24	31	72	13	18	180

REVIEWS IN CONTEMPT PROCEEDINGS SINCE THE CIRCUIT COURT OF APPEALS WAS CREATED.

In re Spofford, 62 Fed. Rep. 443, Judge Wheeler, on an order against Spofford to show cause why he should not be punished for contempt in failing to obey a sub-

poena duces tecum issued upon the order of a circuit court, in an examination before a master, said:

> "As the witness has been in no sense contumacious, but has declined to be sworn or to produce *the books only in order to present objections which* his counsel not unreasonably supposed to be well founded, the order may be in the alternative. It will, however, be made peremptory and final, if witness' counsel so desire; and in that case I shall, by a subsequent order, stay its operation until appeal can be heard and determined by the circuit court of appeals. The supreme court has, it is true, repeatedly held that it could not, either by appeal or writ of error, review the action of a circuit court, inflicting fine or imprisonment for a contempt (Ex parte Kearney, 7 Wheat. 38; New Orleans v. Steamship Co., 20 Wall. 387; Hayes v. Fischer, 102 U. S. 121), on the expressed ground that no appellate jurisdiction in such cases had been conferred upon it by the laws of the United States. The old common-law rule, however,—that the order of a court, whose decisions on all other questions are reviewable, is sacred, and [may] not be inquired into, when it inflicts punishment for contempt,—seems abhorrent to the sense of natural justice. It puts the property and personal liberty of one individual practically at the mercy of another, who, being human, may presumably act, upon occasions, mistakenly, or from prejudice or passion. And it may well be that the circuit court of appeals may find in the broad grant of appellate jurisdiction to review final decisions of the circuit courts 'in all cases other than those (where jurisdiction to

> review is conferred on the supreme court),' which is contained in section 6 of the act of 1891, sufficient warrant for holding that final orders, such as the one here moved for, may be by it examined into, reversed, or otherwise determined."

In Gould v. Sessions, 67 Fed. Rep. 163, the circuit court of appeals for the second circuit reversed an order imposing a fine of $500 for contempt of court in violating an injunction and this, after the same court, on appeal in the principal suit had affirmed the judgment, including all interlocutory orders, in favor of the plaintiff. Upon the particular facts presented, the court of appeals was of the opinion that the order imposing the fine was aside from the proceedings in the principal suit, and that such questions attended the order as to make it a distinct criminal case reviewable on writ of error.

In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. Rep. 873, the circuit court of appeals for the second circuit entertained a writ of error to review a judgment in contempt proceedings rendered in the United States circuit court for the southern district of New York. The case was one in which a defendant was charged with having violated an injunction in a patent suit. The lower court having adjudged the defendant guilty, imposed a fine of $2,000 to be divided equally between the complainant for his compensation, and the United States. The fine was therefore equally remedial and punitive. The procedure seems to resemble that adopted by Judge Taft in Thomas v. Cincinnati, etc., R. Co. et al., 62 Fed. Rep.

803, in which Frank W. Phelan was convicted of contempt in the dual form of interfering with a receiver and violating an injunction. Doubtless, out of consideration for the liberty of the citizen, which the criminal procedure so jealously guards, Judge Taft disposed of the mixed cause as a criminal cause, notwithstanding the civil element it contained. When the circuit court of appeals for the second circuit acted upon the writ of error, it had before it the whole cause. There does not seem to have been any effort on the defendant's part to segregate the civil from the criminal contempt in the lower court.

In Enoch Morgans Sons v. Gibson, 122 Fed. Rep. 420, the United States circuit court of appeals for the eighth circuit, following the precedent set by the circuit court of appeals for the second circuit in Gould v. Sessions, 67 Fed. Rep. 163, entertained an appeal to review an order in contempt proceedings entered in the circuit court of the United States for district of Nebraska for the violation of an injunction. In speaking for the court, Judge Thayer said:

> "Two questions are presented by the record for determination by this court. The first is whether the order made is one from which an appeal will lie; and, if this question be answered in the affirmative, the second question is whether the order discharging the rule to show cause was a proper order.
>
> "Relative to the first of these questions, it is to be observed that in the case of Hayes v. Fischer, 102 U. S. 121, Hayes was cited to appear and show cause why he should not be punished for vio-

lating an interlocutory injunction granted in a patent case. Upon such hearing a fine was imposed, whereupon he sued out a writ of error. On a motion made to dismiss this writ, it was sustained on the *ground that, if the proceeding was to be* treated as a part of what was done in the original case, the action taken could only be reviewed on appeal after a final decree therein, which had not been entered; whereas, if it was to be treated as something entirely independent of that suit, the action taken could not be reviewed in any form—citing Ex parte Kearney, 7 Wheat. 38, and New Orleans v. Steamship Company, 20 Wall. 387. In the latter case (New Orleans v. Steamship Company) it was held that a fine imposed for contempt was a judgment for a specific criminal offense which could not be reviewed by the supreme court of the United States on a writ of error, or in any form, as the court had no jurisdiction in criminal cases at that time save on a certificate in case of a division of opinion in the lower court. The decision of the circuit court of appeals for the second circuit in Sessions v. Gould, 63 Fed. Rep. 1001, was based upon the same facts as the decision in Hayes v. Fischer, an appeal from an order imposing a fine for the violation of an interlocutory injunction having been taken prior to a final decree. The appeal was accordingly dismissed; but in the same case at a later period, and after a final decree had been entered, a writ of error was sued out to obtain a reversal of the order imposing the fine, and the writ was entertained and the order reversed; the court holding that the contempt proceeding was independent of the proceedings in the

original case and reviewable on writ of error. Gould v. Sessions, 67 Fed. Rep. 163. So, also, in the case of Worden v. Searls, 121 U. S. 14, where a fine had been imposed for disobeying an interlocutory injunction, the supreme court reviewed the action of the lower court in imposing the fine on an appeal that was taken after a final decree, saying that the action of the lower court in imposing fines for disobeying its orders was not a matter that was so far discretionary with the court as to prevent such action from being reviewed.

"It is a well-known fact, to which allusion has twice been made in decisions of this court (In re Reese, 107 Fed. Rep. 942, 945; In re Nevitt, 117 Fed. Rep. 448, 458), that contempts of court are of two kinds—those that are prosecuted to punish persons for showing disrespect to the courts, either by offensive conduct in their presence or by setting their authority at defiance, in the prosecution of which the entire public is immediately interested, because the welfare of the courts is concerned; and those contempt proceedings that are inaugurated at the instance of some private litigant or litigants to compel obedience to an order or decree made in the case for the protection of their individual rights. In the latter class of cases the public at large is not directly interested. The proceeding does not partake of the character of a public prosecution at the instance of the state, as for a crime committed in setting the authority of its courts at defiance, but the proceeding is rather of a civil or remedial nature, for the benefit of a particular individual or individuals whose rights can not be otherwise preserved. The distinction between the

two kinds of contempt has been recognized in other cases. People, etc., v. Diedrich, 141 Ill. 669, 670, and cases cited. The case in hand is obviously a contempt proceeding of a civil and remedial nature as distinguished from one of a public or criminal character. The public had no special concern in the question whether the appellee had used words on his labels which violated the injunction, but the appellant was deeply interested in that question, since, if the charge was true, it affected a property right which he had succeeded in establishing. Moreover, if that right was being invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief, when the fact was called to its attention by the appellant, than it could withhold an execution to collect a judgment which it had rendered. We are of opinion, therefore, that the final action of a court in such a case as the one at bar, whether it be an order discharging the rule to show cause or one imposing a fine tantamount to the injury that has been sustained by the complaining party, is subject to review, and that in equity cases like the one at hand, where the object is to enforce the provisions of a final decree and compel obedience thereto, the remedy is by such an appeal as was taken. We think that this view is fully sustained by the action taken by the supreme court in Worden v. Searls, 121 U. S. 14, 26. It was expressly held in that case that the action taken by the lower court, in imposing a fine, was brought before the court for review by an appeal taken after the entry of a final decree, and that the action by the court in that

matter was not so far discretionary that it could not be reviewed. And so we may say in this case that the order of the lower court discharging the defendant was not so far discretionary as prevents it from being reviewed. Moreover, it is too plain for argument that the action taken below was in every respect final, and that no relief could be obtained, if the action was erroneous, otherwise than by an appeal.

"Holding, as we do, that the order in question was one from which an appeal will lie, and that the case is properly before us for review, we proceed to inquire whether the order discharging the defendant was a proper order."

It will be observed that the court allowed the appeal without consideration of the amendment of February 18, 1895 (28 Stat. at Large 666), allowing appeals where the proceedings are interlocutory. Nor does the court consider a case which, while in equity, is prosecuted against a person who for jurisdictional reasons can not be made a party to the main suit and who is denied all appellate relief unless he can appeal from the interlocutory order fining him for the contempt.

In United States, ex rel. Hill, v. Towns, 7 Ben. 444; 28 Fed. Cases No. 16,534, Judge Blatchford held in admiralty that an appeal to the circuit court carried with it a question of contempt arising out of the act of a party charged with removing a vessel from the jurisdiction of the court.

In Westinghouse Air Brake Company v. Christiansen, 123 Fed. Rep. 632, Judge Lacombe refused to suspend until the final hearing an order committing for contempt, the court holding that under the authority of Gould v. Sessions, 67 Fed. Rep. 163, and Carey Company v. Acme Company, 108 Fed. Rep. 873, the order of commitment was interlocutory and subject to appellate review.

In Smith v. Vulcan Iron Works, 165 U. S. 518, this court reviewed the diverse methods of procedure in the various circuit courts of appeals, as illustrated in numerous decisions cited, and held that under the act of March 3, 1891, c 517, sec. 7, an appeal to the circuit court of appeals from an interlocutory order or decree of the circuit court granting an injunction in a patent case might be taken from the whole order or decree and thereupon the court of appeals might dispose of the case on its merits and direct a final decree dismissing the bill. While, as this court declares, the policy of the circuit courts of appeals has been to take a broad view of the act of 1891, yet it seems that congress desired the courts of appeals to have the utmost latitude in speedily determining the issues presented by interlocutory orders and accordingly passed the act approved February 18, 1895 (28 Stat. at Large 666), which makes all orders appealable which may involve the merits of the controversy. See In re Tampa Suburban R. Company, 168 U. S. 583; Huguley, etc., Co. v. Galeton Cotton Mills, 184 U. S. 290, 294; In re Huguley Company, 184 U. S. 297, 301.

This memorandum is intended to be only a review of the law of contempt, as that law appears to the courts. It is therefore presented as a memorandum of additional cases, with no argument in favor of the appellant other than that made by the logic of the cases cited.

Respectfully submitted,

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